Missouri Attorney General's Opinions - 1952

Opinion	Date	Topic	Summary
1-52	Apr 23	STATE BOARD OF ACCOUNTANCY. EFFECTIVE DATE OF HOUSE BILL #449 OF 66TH GENERAL ASSEMBLY NOW SECTION 326.200 RSMO 1949. COMPENSATION OF BOARD MEMBERS.	Effective date of House Bill No. 449 was October 9, 1951; and that the members of the State Board of Accountancy appointed prior to October 9, 1951, shall not receive the increase of compensation allowed in H.B. 449, supra, during their present terms of office.
1-52	May 2	PROSECUTING ATTORNEY, VACANCY IN OFFICE.	A prosecuting attorney in one county may serve also as prosecuting attorney in another county under appointment to fill a vacancy.
1-52	Aug 25	TAXATION. CREDIT INSTITUTIONS. PARTNERSHIPS.	Par. 3, Sec. 148.150 RSMo 1949 of Credit Institutions Tax Act of 1946, construed by general rule of statutory construction. Read, construed and harmonized with subsequent uniform Partnership Act. Former law construed strictly against state; deduction of said statute construed strictly against taxpayer. Partnership Act prohibits parties from drawing salary, hence in arriving at net income taxable to partnership under Credit Institutions Tax Act, partners salaries not deductible under Par. 3; Sec. 148.150, thereof.
1-52	Sept 22	PROBATE COURTS. RESTORATION OF SANITY PROCEEDINGS. JURISDICTION OF.	State patient in state school sent under provisions of Sec. 202.160 RSMo 1949, never adjudged insane previously to admission, who subsequently files petition for restoration of sanity and discharge from school under provisions of Sec. 458.530 RSMo 1949, in probate court of patient's residence should have petition dismissed, since court lacks jurisdiction over subject matter and person of petitioner.
1-52	Sept 24	STATE BOARD OF ACCOUNTANCY – LICENSES.	The Missouri State Board of Accountancy has no power under the statutes of this State to reinstate a license of a person, firm partnership, or corporation which the Board has revoked.
3-52	Sept 2	Hon. Roderic R. Ashby	WITHDRAWN
4-52	July 3	COUNTY SOILS DISTRICTS.	1. The Missouri Extension Service or the College of Agriculture does not have the right to pay $25 or any other sum of state or federal money on the cost of a balanced farm plan for "any individual farmer." 2. The supervisors of a county soils district are neither county nor state

			officials, but are officials of the soils district. Legal action may not be taken against one or more supervisors as individuals so long as they act within the limits of their corporate duties, but each supervisor is liable for wilful or fraudulent breaches of trust or gross negligence.
4-52	Oct 17	COUNTY JUDGES. BOARD OF EQUALIZATION.	County judges in third class counties are entitled to compensation for services as members of the county board of equalization, in addition to their regular pay as members of the county court, and may be entitled to compensation for both services on the same day.
5-52	June 16	TAXATION. REFUND.	The director of revenue is not authorized to make tax refunds on claims filed prior to the effective date of House Bill No. 196.
5-52	June 19	COUNTY COURTS. COUNTY COURT DISTRICTS.	A county court may change its county judicial districts by formal court order.
5-52	July 16	TAXATION. MOTOR FUEL.	Four questions relating to House Bill No. 180 pertaining to a tax on motor fuel.
5-52	Aug 14	GAMBLING EQUIPMENT.	The selling, storing, possession, and transportation in interstate commerce of any punchboard, slot machine, lottery ticket, roulette wheel, policy slip, book, list of numbers, or any article incident to a lottery or other gambling devices, is not prohibited by any law of the State of Missouri.
5-52	Sept 22	SALES TAX. USE TAX. MOTOR VEHICLES.	The owner of a new or used motor vehicle in Missouri, who is not exempt from the payment of a sales tax or a use tax, is not entitled to retain three per cent of such sales tax or use tax.
5-52	Dec 4	COUNTY ASSESSOR. COMPENSATION.	Township assessor not required to perform duties of House Bill No. 392 passed by the 66th General Assembly. County shall pay additional compensation to county assessor provided for in Section 150.335 of said bill.
6-52	May 16	STOCK LAW. ANIMALS.	Township adjoining group of five townships which has previously voted to invoke stock law may thereafter vote to withdraw operation of stock law.
6-52	Sept 24	LICENSES. COUNTY COLLECTORS.	Annual state license tax on ten dollars prescribed by Section 318.020, RSMo 1949, applicable to pool table. County collector has duty under Section 318.040, RSMo 1949, to collect any annual county license tax authorized under Section 318.040, RSMo 1949.
9-52	Apr 8	CIRCUIT CLERKS, FEES IN CASES OF CHANGE OF VENUE.	The Circuit Clerk is entitled to retain all fees earned by him in any case of change of venue for another county.
10-52	Apr 3	COUNTY.	County court may pay bounty on wolves killed in Barton County,

		FISH AND GAME. CONSERVATION.	Missouri, to non-resident exterminators of wolves. Such person shall obtain written permission of the local Conservation agent prior to hunting wolves in said county.
10-52	Sept 2	STATE. CONSERVATION COMMISSION. DRAINAGE DISTRICT. TAXATION.	Land purchased by the State in a Drainage District subsequent to the organization and formation of said Drainage District, is not subject to an annual maintenance tax.
10-52	Oct 23	MOTOR VEHICLES.	Over weight fine under Section 304.240, Laws of Mo., 1951, is minimum fine not maximum and minimum fines are bracketed in accordance with amount of overweight.
11-52	Jan 16	OFFICERS. SHERIFFS. FEES AND SALARIES.	Sheriff of third class counties entitled to mileage for making investigation of persons accused of or convicted of a criminal offense.
11-52	Apr 28	MARRIAGES. VITAL STATISTICS. RECORDERS.	Section 451.080, RSMo 1949, setting forth the form of marriage license not superseded by Section 193.360, RSMo 1949.
11-52	June 27	COUNTY BUDGET LAW.	General county revenue may be budgeted in Class 6 for the construction, repair and maintenance of bridges.
11-52	Oct 23	Hon. Clyde Bridger	WITHDRAWN
13-52	Sept 4	CONVICTS NOT AUTOMATICALLY RESTORED TO CITIZENSHIP.	Persons released from penitentiary on the seven-twelfths rule are not automatically restored to citizenship at the expiration of two years from the date of discharge.
13-52	Dec 22	PROBATION OFFICERS. Supreme Court Rule #27.07 page 43, Rules of Criminal Procedure for Missouri Courts adopted by Supreme Court of Missouri, April 14, 1952, effective January 1, 1953.	Rule 27.07 of Rules of Criminal procedure within meaning of Article V, Section 5 of the Constitution of Missouri Board of Probation and Parole is bound by said Rule 27.07.
14-52	Oct 6	BOARD OF ELECTION COMMISSIONERS.	The Board of Election Commissioners in passing upon the sufficiency of initiative petitions acts only in a ministerial capacity.
15-52	Jan 21	ELECTIONS.	County court not required to furnish permanent voting places within

		COUNTIES.	county for conducting elections.
15-52	Feb 15	OPERATOR AND CHAUFFEUR'S LICENSE MAY BE REVOKED BY MAGISTRATE COURTS.	Operator or chauffeur's license to operate motor vehicle within state may be revoked by magistrate court under Sec. 302.225(4) of Senate Committee Substitute for House Bills 22, 49, 56 and 114, for causes provided in act.
15-52	May 16	MOTOR VEHICLES. HIGHWAYS.	Corporation which is owner and operator of motor vehicle may be prosecuted for an overweight vehicle.
15-52	Sept 4	CRIMINAL LAW. BOARD OF PRISONERS; WHEN THIRD OR FOURTH CLASS COUNTY NOT LIABLE FOR.	One confined in county jail for third or fourth class county for twenty hours for alleged violation of city ordinance without warrant, process or formal charge against him, is not a prisoner within meaning of Sec. 221.090 RSMo 1949; county not liable for person's board bill to sheriff, since alleged violation of city ordinance is not crime, and person is not confined for violation of any criminal laws of Missouri.
15-52	Sept 24	MUNICIPALITIES. TAXES.	City of fourth class not required to certify delinquent tax lists to county collector under Sec. 140.670, RSMo 1949, and county clerk not required under Sections 140.060 and 140.070, RSMo 1949, to prepare back tax book for fourth class city.
15-52	Sept 30	MOTOR VEHICLES. TRAFFIC AND EQUIPMENT REGULATIONS. OVERWEIGHT.	Section 304.180, A.L. 1951, H.B. 283, prohibits the operation on the highways of this state of a vehicle having a greater weight than 18,000 pounds on one axle when the wheels attached to said axle are equipped with low pressure tires.
15-52	Oct 7	MOTOR VEHICLES. HIGHWAYS. COUNTY COURTS.	Section 304.220, RSMo 1949, is constitutional, in allowing county courts to limit maximum weight of motor vehicles on roads other than highways when roads are in soft condition.
15-52	Oct 16	Hon. John M. Cave	WITHDRAWN
15-52	Oct 27	MOTOR VEHICLES. AXLE LOADS.	For the purposes of determining the gross weight of a vehicle or combination of vehicles under Section 304.180, A.L. 1951, H.B. 283, the front or steering axle is to be considered as one of a group of two or more consecutive axles.
16-52	Nov 20	Mr. L. M. Chiswell	WITHDRAWN
18-52	Apr 21	MAGISTRATE COURTS. JURIES.	A sheriff is allowed the sum of $2.00 for issuing a "special venire facias" for a jury in a magistrate court. A magistrate judge is under no duty to summon a regular jury panel.
18-52	Oct 20	MOTOR VEHICLE REGISTRATION.	Under House Bill No. 211 a person moving into Missouri from another state may demand and obtain from his local collector a statement

		PERSONAL PROPERTY TAX.	showing that no taxes on personal property were due for the preceding year. A person moving from one county to another within Missouri must obtain a tax receipt or statement from the collector where he resided at the time assessments were made for the preceding year.
19-52	Jan 31	ATHLETIC COMMISSION. TAXATION.	Section 317.020, RSMo 1949: Tax on "gross receipts" from regulated boxing, sparring and wrestling exhibitions not to be applied to receipts obtained by theaters televising such exhibition. Five per cent of the gross amount paid for the right to televise such exhibitions should be collected on the amount paid for the right to televise such exhibitions.
19-52	Feb 13	CONSERVATION COMMISSION. FISH AND GAME.	Validity of license by the Department of the Army for wildlife management purposes at Bull Shoals Reservoir Area.
19-52	Aug 1	SCHOOLS. RADIO AND TELEVISION.	Board of Curators of the University of Missouri authorized to maintain and operate a TV station in connection with educational function of the university.
20-52	Sept 3	AGRICULTURE.	Hogs appraised and slaughtered under provisions of Section 267.160 RSMo, 1949, may be disposed of at federally approved packing plants, and claims for indemnity payable therefor by State of Missouri are legal claims to be paid, if, and when, an appropriation is made for such purpose.
20-52	Oct 24	SCHOOLS. ELECTIONS.	Public meeting must be held to dissolve a consolidated school district. Proposition to form common school districts cannot be submitted at the same public meeting wherein an election is conducted to vote on the proposition of dissolving a consolidated school district.
20-52	Nov 10	MOTOR VEHICLES – REGISTRATION – OPERATION.	1) Commercial motor vehicles registered for a full year. 2) Weight load change immaterial. 3) Maximum weight load permitted full year. 4) Over maximum weight limit permitted by highway department. 5) Credit to owner for fees paid before if fees increase. 6) Owner may operate vehicle under subsections (8) new law or (10) old law. 7) Farmer may borrow lease or rent licensed vehicle from another farmer for hauling distances over twenty-five miles to farm of operator under Secs. 10 and 19. House Bill No. 283. 8) Resident of Missouri cannot operate leased vehicle owned and registered outstate, vehicle not being subject of agreement for sale or lease and not in possession of potential mortgagor to operate from Missouri in either interstate or intrastate business on Missouri highways unless vehicle registered in Missouri. Foreign licenses no protection to operator on highways of Missouri.
21-52	Apr 11	INTOXICATING	1. Owners and operators of a cafe or club, who are not licensed to sell

		LIQUOR. NONINTOXICATING BEER.	any kind of liquor, may permit the consumption of 3.2 beer upon premises of the cafe or club by any individual at any time. 2. Owners and operators of a cafe or club, who are not licensed to sell any kind of liquor, may permit the consumption of intoxicating liquor upon their premises except between the hours of 10 p.m. and 6 a.m.
21-52	June 30	MOTOR VEHICLES. COLLECTOR.	Under House Bill 211 a person who owns personal property which is not assessed is entitled to a certificate that no taxes are due.
21-52	Oct 14	Hon. Bill Davenport	WITHDRAWN
21-52	Oct 27	CRIMINAL COSTS. BOARD OF MATERIAL WITNESSES. HOW TAXED IN THIRD OR FOURTH CLASS COUNTIES.	In third or fourth class county when examining magistrate in felony case binds defendant over for trial in circuit court and commits material witnesses to jail in default of required recognizance, and defendant is convicted and sentenced to penitentiary; county, and not state liable to reimburse sheriff for board bill.
21-52	Dec 23	Hon. Ken F. Davis	WITHDRAWN
22-52	Feb 11	SHERIFFS.	Under Section 57.430, RSMo 1949, as repealed and reenacted by House Bill No. 100, 66th General Assembly, sheriffs and also their deputies in counties of the third class are contemplated within the provisions of the section authorizing special allowance for expense of investigations of persons accused of or charged with criminal offense; such investigations not to be limited to the confines of the county.
22-52	May 23	ELECTIONS.	A party primary ballot need not contain the name of an office where no one has filed a declaration seeking the party primary.
22-52	Sept 22	COUNTY COURTS. DRAINAGE DISTRICTS.	County court cannot purchase machinery for maintaining ditches, drains and levees in only part of the districts of the county under Section 243.330, RSMo 1949.
22-52	Nov 5	FIRST CLASS COUNTIES. SEWER DISTRICTS.	Sewer districts formed in St. Louis County should be formed according to the provisions of Sections 249.430-249.660, inclusive, RSMo 1949.
24-52	Jan 30	Mr. G. L. Donahoe	WITHDRAWN
24-52	Feb 15	FEES. CITY POLICE.	A policeman of the city of the first class is not entitled to the fee provided by Section 57.290, RSMo 1949, for making an arrest under a warrant issued by a magistrate.
24-52	Feb 18	FEES. MAGISTRATE COURT. PROSECUTING ATTORNEY. MAGISTRATE CLERK	Prosecuting attorney's fee in this case is $5.00; the fee of the magistrate's clerk is $2.50 and sheriff receives nothing.

		AND SHERIFF.	
24-52	Apr 4	SOCIAL SECURITY. SOCIAL WELFARE BOARDS.	Employees of social welfare boards are not employees of the city or county. A social welfare board is an instrumentality and its employees may be covered under the Old Age and Survivors Insurance provisions of Title 2 of the Federal Social Security Act only by an agreement entered into between the state agency and the social welfare board of the county.
24-52	May 29	SCHOOLS.	Compulsory retirement provision for members of PSRS now effective as WWII has been officially terminated. Board of trustees of PSRS has no duty to restrain member from teaching after attaining compulsory retirement age. Member who has attained compulsory retirement age not eligible for retirement allowance if he continues to teach. Board of trustees should not accept contributions in behalf of member and employer if member continues to teach after automatically retired.
24-52	Oct 20	CRIMINAL COSTS.	Services and attention by a dentist to a prisoner confined in a county jail—later convicted of a felony—are not lawful charges of criminal costs as medical expenditures against the State under Section 221.120 RSMo 1949.
25-52	Mar 1	CHIROPRACTIC. EXAMINATION. LICENSE.	Applicant for examination for chiropractic license to practice chiropractic must be a graduate of an accredited chiropractic school or college.
25-52	July 1	OLD AGE ASSISTANCE DEFINED. SECTION 306, USCA TITLE 42. BOARD OF CHIROPRACTIC EXAMINERS.	Benefits up to the maximum can be paid to those receiving old age assistance to pay for chiropractic treatment or other remedial care.
26-52	Apr 28	SCHOOLS.	County board of education, in making study of school districts and advising with school officials, may evaluate teacher personnel. Said board has no authority to employ a school nurse and assess school's percentage of costs.
26-52	Sept 22	CITY CHARTER. AMENDMENT.	Sections 82.030 and 125.050, RSMo 1949, prescribing the duties to be performed and the form of ballot to be used by the Board of Election Commissioners in submitting proposals to amend the city charter of that city are mandatory.
26-52	Oct 23	ELECTION RETURNS OF THE CITY OF ST. LOUIS.	In making election returns to the Board of Election Commissioner ballots should be enclosed and sealed in four separate containers as follows: (1) The general blanket ballots together with ballots marked "defective, objected to, or rejected;" (2) The Constitutional Ballots; (3)

			The Judicial Ballots and; (4) The unused ballots together with the stubs of the used ballots.
28-52	Feb 4	COUNTY COLLECTORS.	Current drainage taxes included in determining compensation for mailing notice of taxes due.
28-52	Oct 1	STATE MERIT SYSTEM. FEDERAL SOLDIER'S HOME.	Board of Trustees of Federal Soldiers' Home at St. James authorized to appoint employees when conforming with the State Merit System Act.
30-52	Aug 28	TAXES – OWNER LIABLE FOR TAXES.	The owner, on the first day of January, of tangible personal property is liable for taxes levied and assessed on such property for the ensuing year.
30-52	Nov 12	TAXATION. TANGIBLE PERSONAL PROPERTY.	The "in lieu" provisions in Sections 148.120 to 148.230, RSMo 1949, exempting Credit Institutions from paying tangible personal property taxes are unconstitutional.
31-52	Feb 15	COUNTY BUDGET LAW.	Surpluses in Class 1, 2 and 4 may be transferred to Class 5 although the surplus exceeds the fund budgeted under this class.
31-52	Nov 18	Hon. Gene Frost	WITHDRAWN
31-52	Mar 24	COUNTY COURT. BOUNTIES. COYOTES & WOLVES. SECTION 279.010, RSMO 1949, AS AMENDED, LAWS MO. 1951, BY HOUSE BILL #344. SECTION 279.030, RSMO 1949, AS AMENDED, LAWS MO. 1951, BY HOUSE BILL #344.	On and after March 18, 1952, the county shall pay the sum of $30.00 for any grown coyote or wolf and the sum of $5.00 for each coyote or wolf pup which may be killed in the county, and the state treasurer shall reimburse the county treasurer two-thirds of all bounties paid by such county.
31-52	Mar 26	WITNESS FEES. MAGISTRATE COURT.	Witnesses attending the magistrate court shall be allowed such fees as are set forth in Section 491.280, RSMo 1949.
32-52	May 15	Hon. William J. Geekie	WITHDRAWN
33-52	Mar 6	Hon. C. L. Gillilan	WITHDRAWN
33-52	Mar 17	COUNTY COURTS. TAXATION.	Under Section 137.270, RSMo 1949, county courts may not hear and determine allegations of erroneous assessment or mistakes or defects in description of lands after taxes have been paid.

33-52	Aug 25	COUNTY. OLD AGE PENSION. DIVISION OF WELFARE.	Division of Welfare not required under the law to assume the difference between the old age grant to the recipient and the seventy-five dollar monthly charge by said home.
33-52	Sept 10	COUNTY COURTS. COUNTY ROADS.	In the absence of a county highway engineer and the unavailability of the county surveyor, the county court may appoint any one who is a competent engineer to assist the county court in the formulation of the county road improvement and construction program to be presented to the state highway commission for securing state aid in the improvement and construction of county roads.
33-52	Sept 23	TAXATION. COUNTY CLERKS.	Under Section 165.083, RSMo 1949, county clerks required to extend all tax levies for school purposes in separate columns of tax book.
35-52	Feb 14	CHIROPRACTIC BOARD OF MISSOURI.	The Chiropractic Board of Missouri has the authority to hire an investigator, to be paid by the legislative appropriation out of the Chiropractic Board in carrying out the duty imposed on it to investigate all members of their profession who are charged with or suspected of immoral or illegal actions.
35-52	Feb 18	COUNTIES. CARE OF INSANE PERSONS. COLLECTION OF EXPENSES. FOR MAINTENANCE OF INSANE PERSONS. PROBATE COURT.	County expenses incurred in support and maintenance of an insane person may be recovered by the county from such insane person's guardian and curator or administrator.
35-52	Mar 11	OFFICERS. COUNTY CLERK.	County clerk who holds over after January 1, 1950, holds office until his successor is appointed and qualified or until 1952, when his successor is elected and qualified.
35-52	June 10	PROBATE COURTS. INSANITY HEARINGS. COSTS. HOW TAXED.	Under Sec. 458.080, RSMo 1949, court to order insanity hearing costs paid from insane's estate if sufficient. If insufficient to order county to pay costs; to follow procedure under Sec. 202.160, R.S.Mo 1949. If person discharged to order costs paid by informant, under Sec. 458.090, court cannot legally accept costs from informant or any other person. Under Sec. 49.270, county court can accept for county, reimbursement of amount of maintenance of indigent insane in state hospital when made by one not legally, liable for insane's support, and not from insane's estate.
35-52	Sept 3	TAXES. DELINQUENT, LAND SALES.	Taxes are not delinquent on forest croplands if a sum in lieu of such taxes is paid to counties in which such lands lie from the Forest Croplands Fund. Such lands may not be sold on account of taxes so

			relieved.
37-52	Jan 23	CIVIL DEFENSE. GOVERNOR. OFFICERS.	Governor, by rule, may require loyalty oath of civil defense employees.
37-52	Feb 8	DIVISION OF HEALTH, Power to Fix and Increase Fees for Services.	The Division of Health may increase fees for services rendered by the Department for maintenance of a safe quality of water dispensed to the public, provided, such increase is necessary to cover the costs of such services.
37-52	Feb 14	CIVIL DEFENSE.	Civil defense monies received from Federal government and political subdivisions not state monies so as to be placed in state treasury and appropriated.
37-52	Feb 20	CRIMINAL LAW. MOTOR VEHICLE.	Owner subject to penalty of misdemeanor for operating motor vehicle not properly licensed where driven by an agent or employee.
37-52	Mar 25	Hon. L. A. Hansen, D.S.C.	WITHDRAWN
37-52	Aug 22	COUNTY COURTS. APPROPRIATIONS.	The county court in any county may in any one year, appropriate out of the county treasury, a sum of money not exceeding $300, for the benefit of any society in its county regularly organized as a county agricultural and mechanical society, county fair, county corn growers' association, county poultry association, county stock growers' association, or any other organization or incorporated society having for its object the holding of county fairs or the advancement of agriculture or its allied industries, and that such appropriation is not limited to any one such society but that the county court may make such an appropriation to as many such societies as it deems expedient.
37-52	Sept 13	Hon. Morran D. Harris	WITHDRAWN
37-52	Oct 16	Hon. C. D. Hamilton	WITHDRAWN
37-52	Dec 16	TAXATION. DELINQUENT PERSONAL TAXES.	Collector shall collect on delinquent personal property taxes an amount not to exceed 1% per month or 10% per annum and 2% of the amount of the tax.
39-52	Jan 21	THE INDUSTRIAL COMMISSION OF MISSOURI.	The Industrial Commission of Missouri, a member or a Referee may approve settlements at any time, including a case on appeal, and may make a temporary or final award and perform any other act concerning awards except to review awards, the full Commission only having the right to review awards. The Division does not have exclusive authority to make awards. Rules A and B giving the Division such exclusive power, and depriving the Commission and its separate members of the power to hold hearings, make awards or approve

			compromise settlements are invalid.
39-52	Apr 16	SOCIAL SECURITY. COUNTY HEALTH CENTER.	Employer's contributions on county health center employees are paid from the county health center fund.
39-52	May 1	COUNTY TREASURERS.	Cost of envelopes and postage required to carry out duties imposed by H.B. 199, 66th General Assembly is expense incident to the office and not one to be personally borne by officer carrying out such duties.
39-52	May 28	TAXATION. COMPROMISING TAXES.	Delinquent personal property taxes, except interest and penalties, cannot be compromised.
40-52	Jan 24	CRIMINAL LAW. PROSECUTING ATTORNEY.	Magistrate judge must hear and determine careless and reckless driving cases, a misdemeanor, brought by information filed by the prosecuting attorney even though the evidence tends to show the defendant might have been charged with the felony of driving while intoxicated.
40-52	May 12	COUNTY COURT. SEWER SYSTEM.	The county court has no authority to contribute county funds to aid in the construction of a sewer system.
40-52	Oct 30	COUNTY CENTRAL COMMITTEE MEMBERS. SPECIAL ROAD DISTRICT COMMISSIONER.	County Central Political Committee elected officials. Membership not incompatible with holding an elective county or municipal office. Position of special road commissioner not incompatible with elective position of alderman or councilman of a municipality under Secs. 233.170-233.315, RSMo 1949.
41-52	Jan 18	ASSESSOR'S FEES. THIRD AND FOURTH CLASS COUNTIES.	Neither the Constitution of 1945, nor RSMo 1949, prescribe a maximum amount of fees that may be received and retained by assessors in third and fourth class counties. Said assessors are legally entitled to receive and retain every fee accruing to their offices annually as compensation for their services.
41-52	Jan 29	COUNTY CLERKS. FEES AND SALARIES.	County clerks of third and fourth class counties entitled to charge both the state and county the fees provided for duties regarding manufacturer and railroad tax books. Such fees are unaccountable.
41-52	Apr 15	OFFICERS. SALARIES AND FEES.	Prior to enactment of Section 57.430, RSMo 1949, a county court had no statutory authority to pay mileage for travel of a sheriff going beyond boundary of state to return juvenile delinquent to this state. Since enactment of above section, sheriff is allowed maximum of $75.00 in calendar month for performance of official duties in connection with the investigation of persons accused or convicted of a criminal offense.
41-52	May 26	ASSESSORS.	County Assessors are entitled to fees provided in House Bill No. 392, in

		HOUSE BILL NO. 392.	addition to other compensation provided by law.
41-52	Nov 26	Hon. Harrison W. Hollie	WITHDRAWN
42-52	Oct 21	ELECTIONS. ABSENTEE BALLOTS.	An absentee ballot which is obtained at a time more than thirty days preceding the election at which it is cast may be counted if otherwise in conformity with the absentee voting law.
43-52	Jan 2	CIRCUIT CLERKS – DEPUTIES AND ASSISTANTS.	Under the provisions of Section 483.345, RSMO 1949, Clerks of Circuit Courts in class three counties in this State may discharge any deputy or assistant at any time.
43-52	Apr 7	BANKS, DEPOSITARIES OF PUBLIC FUNDS.	A depositary of county funds may be required to give security for only such funds as are in excess of ten thousand dollars where the depositary is insured by the Federal Deposit Insurance Corporation.
45-52	Mar 10	SHERIFFS. BOARDING AND FEEDING PRISONERS.	1) The Sheriff must furnish wholesome food to prisoners in jail. 2) A county should furnish equipment therefor. 3) If the county has no such equipment it may lease equipment from the Sheriff for such purpose by contract for a reasonable sum to be included in the actual cost of feeding prisoners. 4) The Sheriff must make a sworn statement each month of such actual cost. 5) The County Court must audit same to arrive at what such actual and necessary cost amounts to and then draw a warrant on the county treasury, payable to the Sheriff for such actual and necessary cost. 6) The Sheriff cannot lawfully employ a relative within the fourth degree of consanguinity or affinity to prepare meals for prisoners, or for any other purpose, and charge the county therefor, but may accept services of a member of his family without cost to the county.
48-52	June 27	PUBLIC PRINTING AND BINDING. ELECTION LAWS REVISION COMMISSION.	Report required under sub-paragraph three of Section 4 of Senate Bill No. 194 of the 66th General Assembly, to be printed and published through state purchasing agent. Expense of publishing such report to be borne by Election Laws Revision Commission out of appropriation made by the 66th General Assembly.
48-52	Sept 19	LOTTERIES. GIFT ENTERPRISES.	A procedure wherein persons purchase tickets of admission to a theater where they are permitted to participate in a contest which consisted of determining, upon a card furnished by the theater, the correctness of certain statements submitted by the theater to the participants, with a cash prize awarded to the winner, would be a lottery or a gift enterprise, and would therefore be illegal.
48-52	Nov 7	INHERITANCE TAX. TRUSTS. LIFE ESTATE. HOW TAXED.	For the purpose of inheritance taxes a life estate must be valued according to mortality tables, not according to actual duration of life estate.

48-52	Nov 24	GRAND JURIES. CITY OF ST. LOUIS.	A Grand Jury selected for the September, 1952, Term of the Circuit Court cannot legally be continued into or for the December, 1952, Term of said Court.
49-52	Feb 14	ELECTIONS.	Ward formed in Kansas City and Clay County entitled to committeeman and committeewoman in Clay County Central Committee.
49-52	Feb 18	ELECTIONS. COMMITTEEMEN. COMMITTEEWOMEN.	Creation of Ward 21 in that part of Kansas City located in Clay County creates vacancy in offices of committeeman and committeewoman in such ward of county central committee of Clay County. Governor can fill vacancies upon official advice that Ward 21 has been created by Election Board of Kansas City.
49-52	Mar 4	CONSTITUTIONAL LAW. CIRCUIT CLERK. COUNTIES.	Circuit clerk of third class county having assessed valuation in excess of $50,000,000 shall perform duties as ex officio parole commissioner and receive maximum compensation as provided for third class counties under S.C.S.S.B. No. 227, enacted by the 66th General Assembly.
49-52	May 14	ABORTION. CRIMINAL LAW.	Unlawful to perform abortion on pregnant woman who has contracted German measles unless necessary to preserve the life of woman or life of unborn child.
49-52	Sept 10	MUNICIPALITIES.	The City of Springfield may install parking meters on streets bounding the Greene County Courthouse.
49-52	Sept 10	COUNTY TREASURER.	County treasurers of third class counties not entitled to reimbursement for clerical hire which is not indispensably necessary to the successful and efficient conduct of the office.
49-52	Sept 23	COUNTY HEALTH CENTERS.	Subject to the provisions of the law a county may establish a county health center. Such county health center would have jurisdiction over and would function in all parts of the said county. Such jurisdiction and functions would not be affected by the fact that a portion of a city occupies a portion of this said county.
52-52	Jan 25	PROSECUTING ATTORNEY, FEE OF SPECIAL PROSECUTOR.	The fee provided by law for a special prosecutor must be taxed and paid as costs in all cases in which such an officer is employed.
52-52	Feb 5	INSURANCE.	Amendment of Articles of General American Life Insurance Company.
52-52	Feb 14	INSURANCE.	Amendment of Articles of Incorporation of Merchants Mutual Casualty Company.
52-52	Feb 18	INSURANCE.	Amendment of Articles of Incorporation of Insurance Company of St. Louis, Missouri.
52-52	Feb 18	INSURANCE.	Amendment of Articles of Incorporation of the Postal Life and Casualty Insurance Company.

52-52	Feb 18	INSURANCE.	Amendment of Articles of St. Louis Fire and Marine Insurance Company.
52-52	Feb 21	INSURANCE.	Amendment of Articles of Incorporation of Central Mutual Casualty Company.
52-52	Mar 7	INSURANCE.	Amendment of Articles of Incorporation of Mid-Continent Casualty Company.
52-52	Apr 23	INSURANCE.	Amendment of Articles of Incorporation of Washington Fire and Marine Insurance Company.
52-52	May 2	INSURANCE.	Amendment of Articles of Incorporation of St. Louis Fire and Marine Insurance Company.
52-52	May 29	INSURANCE.	Amendment of Articles of Incorporation of Atlas Mutual Insurance Company.
52-52	July 8	INSURANCE.	Amendment of Articles of Incorporation of Transit Casualty Company.
52-52	Aug 14	INSURANCE.	Amendment of Articles of Incorporation of Washington Fire and Marine Insurance Company.
52-52	Sept 10	INSURANCE.	Amendment of Incorporation of Empire Casualty Insurance Company.
52-52	Nov 13	INSURANCE.	Amendment of Articles of Incorporation of National Home Life Assurance Company.
52-52	Nov 26	INSURANCE.	Proposed Articles of Incorporation of Midland Mutual Insurance Company.
52-52	Dec 9	INSURANCE.	Articles of Incorporation of Old Security Life Insurance Company.
52-52	Dec 23	INSURANCE.	Articles of Incorporation of Midland Mutual Insurance Company.
54-52	Mar 14	MOTOR VEHICLES, REGISTRATION.	The director of revenue may refuse registration of a motor vehicle dealer when it appears that the applicant is not in fact a dealer. He may suspend or revoke the registration of a dealer only in specific cases.
57-52	Jan 17	PROBATE COURT. RECORDS.	Justices of the peace records and probate court minute books may not be destroyed.
57-52	Aug 15	REGISTRATION OF PRIVATE DETECTIVE AGENCIES.	It is not necessary that private detective agencies register in the office of the Secretary of State, which agencies are operating in Kansas City, Missouri.
57-52	Sept 4	MAGISTRATE COURT COSTS. CRIMINAL CASES COLLECTIBLE FROM	Magistrate fee in magistrate cases an information filed by prosecuting attorney where fine and costs are assessed against defendants of $2.50 allowed under Section 483.610, RSMo, 1949, is proper charge. $2.50 is proper charge to be collected from the county court on cost bill

		THE COUNTY COURT IN CERTAIN INSTANCES.	submitted under Section 550.030, RSMo, 1949. $2.50 cost collected in these criminal matters should be collected by magistrate and accounted for by him to the persons and in the ways mentioned in Section 483.615, RSMo, 1949.
58-52	May 2	Hon. Robert S. McClelland	WITHDRAWN
59-52	Jan 7	SANITY HEARINGS. PROSECUTING ATTORNEYS.	It is improper for a prosecuting attorney to represent, at a sanity hearing held within his county, the person whose sanity is the subject of inquiry; also, it is improper for a prosecuting attorney to represent, in his private capacity, an informant in a sanity hearing, but it is the duty of a prosecuting attorney to represent the state and/or county at all sanity hearings held within his county.
59-52	Feb 6	TAXATION. RETAIL DEALER IN NEW AUTOMOBILES A MERCHANT. AUTOMOBILES TAXABLE.	Retail dealer in automobiles at fixed place of business, a merchant within meaning of Section 150.010, RSMo 1949, for tax purposes, and new automobiles are “merchandise”. Not being exempt under any statutes, said automobiles are liable for taxation. Duty of dealer to list stock of automobiles in statement to county assessor, as provided by Section 150.050, RSMo 1949.
59-52	Apr 22	FEES OF. CORONERS. STENOGRAPHERS IN MAGISTRATE COURT, HOMICIDE CASES.	Coroner can only be allowed and paid fees provided by Sec. 58.540 RSMo 1949 for writing down witnesses testimony at inquest; to be paid by county when estate of deceased person insufficient and no one liable or able to pay costs. Examining magistrate in homicide case may appoint stenographer to take down and certify testimony under Sec. 485.150 RSMo 1949. Stenographer to be allowed and paid only fees provided by section; fees taxed as costs and paid as other costs.
59-52	Oct 10	PUBLIC BUILDINGS. BIDS.	A bid proposal which does not bid on the entire project advertised and which does not meet reasonable requirements is not a compliance with the advertisement and should be rejected.
59-52	Dec 31	PUBLIC BUILDINGS. BIDS.	Mere informalities in a bid proposal on public improvements may be waived when in the best interest of the state.
62-52	Jan 4	Hon. Harold L. Miller	WITHDRAWN
62-52	Apr 9	COUNTY COURTS. BOUNTIES.	A county court may inquire into the validity of a bounty claim made against the county before paying such claim and if after such investigation, which may include evidence offered by any person or persons, the court is satisfied that the claim is fraudulent, it may refuse to pay.
63-52	Feb 19	TAXATION. THIRD CLASS COUNTIES.	Township collector of 3rd class township organization county to receive fees provided by Sec. 139.430(4), RSMo 1949, for collection of all general taxes in township. Not entitled to receive fee in addition to

		TOWNSHIP ORGANIZATION. TOWNSHIP COLLECTOR'S FEES.	that prescribed by Sec. 139.430(4), for collection of personal taxes by district and sale under Sec. 139.360, RSMo 1949, since additional fee is not provided for by any Missouri statutes.
63-52	Mar 28	SCHOOLS. ROADS AND BRIDGES. SPECIAL ROAD DISTRICTS. COUNTY SUPERINTENDENT OF SCHOOLS.	Secretary of county superintendent of schools may do work for other county officers and receive compensation therefor. Special road district may cease to maintain roads in territory which may or may not be in district.
63-52	Apr 17	PROSECUTING ATTORNEY. TOWNSHIPS. COLLECTOR. TAXES.	Duty of Prosecuting Attorney to sue defaulting township collector.
63-52	June 24	COUNTY ORGANIZATION. COUNTY COLLECTOR. COUNTY ASSESSOR.	Until election and canvass of vote under Sec. 65.610, RSMo, 1949, abolishing township organization is had, no vacancy exists in office of county collector and county assessor and filings for such offices prior thereto are not authorized by law.
63-52	Sept 30	OPERATORS.	Persons having operator's license must take examination as required by statutes in order to obtain chauffeur's license.
64-52	Sept 15	GIFTS TO STATE. DISPOSITION; WHEN PURPOSE OR FUND NOT DESIGNATED.	Check payable to Treasurer of Missouri in sum of $2,000 in payment of group life policy in which State of Missouri is beneficiary; the proceeds of check to be deposited in treasury to credit of ordinary revenue fund of state.
65-52	Jan 29	CRIMINAL LAW. FUNDS, FOURTH CLASS CITY. DISBURSEMENT. PROSECUTION FOR. WHEN.	Treasurer of 4th class city disbursing funds after failure of city to publish semi-annual financial statement required by Sec. 79.160, RSMo 1949; and before effective date of Sec. 79.165, Laws of 1951, making payment by treasurer under such circumstances a crime, could not be prosecuted, since the act was not a crime when committed. But after effective date, if treasurer disburses city funds and semi-annual statement has not been published prior to disbursement, he may be prosecuted for violation of Sec. 79.165.
65-52	Aug 19	MOTOR VEHICLE REGISTRATION, PERSONAL PROPERTY TAX.	Under House Bill No. 211 an applicant for a license to operate a motor vehicle must show that he has paid his personal property taxes for the preceding year but need not show a tax receipt for any year previous to that.
65-52	Sept 18	ELECTIONS. BALLOTS.	It is unlawful for a voter to attach a sticker containing the name of a person for whom the voter wishes to cast his vote printed thereon as

			provided in Section 111.580, RSMo 1949.
65-52	Sept 22	BONDS. SURPLUS.	Any money remaining over as the result of a special tax to retire county bonds after the retirement of said bonds shall be paid into the general revenue fund of such county.
66-52	Apr 7	SOCIAL SECURITY. COUNTY EMPLOYEES. THIRD AND FOURTH CLASS COUNTIES.	Section 51.415, enacted by the 66th General Assembly, applies to all counties of the third and fourth class which have entered into an agreement under Senate Committee Substitute for Senate Bill No. 3, to place county employees under the Federal Social Security Act. It is not void for being discriminatory.
66-52	Sept 23	TAXATION. STATE TAX COMMISSION.	State Tax Commission is required to apportion the property of a street railroad company to school districts levying taxes for library purposes and library districts based upon the length of line in the district as submitted by the company.
68-52	Apr 3	OFFICERS. ASSISTANT PROSECUTING ATTORNEY.	Assistant prosecuting attorneys in counties of the second class may sign informations either for felonies or misdemeanors.
68-52	June 9	CIRCUIT CLERK AND RECORDER, DEPUTIES.	A deputy in the office of circuit clerk and recorder must reside in the county three months before appointment.
68-52	Nov 21	CIRCUIT COURTS. SUPPORT OF DEPENDENTS. UNIFORM LAW.	A person proceeding under the Uniform Support of Dependents Law would be required to file security for costs or a deposit if a nonresident, and would be subject to the rules of the circuit court in regard to costs where a resident.
69-52	Mar 21	COUNTIES. BOND ISSUES.	County budget law, Sections 50.670 to 50.740, RSMo 1949, applicable to fourth class counties, does not authorize bond issue to retire unpaid county warrants. Section 108.130, RSMo 1949, authorizes fourth class counties to fund any judgment indebtedness resulting from the issuance of unpaid county warrants.
69-52	Apr 8	SPECIAL ROAD DISTRICT. WARRANTS. COMMISSIONER'S POWER TO ISSUE.	Where special road district commissioners of non-township organization county issue a warrant on the county treasurer for all district's funds; deposit proceeds in a bank and issue checks for district's obligations. Commissioner's actions illegal and violates Sec. 233.185 RSMo 1949, as custody cannot be changed from treasurer. Commissioners elected or appointed under Sec. 233.180 RSMo 1949, do not forfeit office, hold to end of term. Commissioners not guilty of crimes under any Missouri statutes.
69-52	Apr 29	TAXATION.	A taxpayer may pay any years taxes without tendering payment of taxes due for other years.

69-52	Sept 30	STATUTES. LEGAL PUBLICATION.	The general printing statute and the delinquent tax statute in regard to the cost of publication of delinquent lands must be read and construed together.
69-52	Dec 8	SHERIFF'S BOND. STATUTES.	The provisions of the Missouri statutes relating to the giving of a bond by a sheriff elect is to be construed as simply directory and would not by their own force create a vacancy in office.
70-52	May 20	ELECTIONS.	Person may vote for single candidate for congressman or city councilman if he desires, even though more than one office is to be filled from candidates for congressmen or city councilmen.
70-52	Sept 30	STATE PHARMACY BOARD. PHARMACY PERMITS (ANNUAL) DUE WHEN. USE OF FEES. INSPECTORS, SALARIES AND EXPENSES.	Annual fee for permit due October 1, 1952, permit expires June 30, 1953. Proprietor of wholesale drug business must be licensed pharmacist or have at least one in his employ. Permit fees can be used if appropriated to Board's use by General Assembly. Inspectors could be hired after August 1, 1952, on 1951-1953 appropriation if there are sufficient funds in it.
70-52	Dec 9	ELECTIONS. PUBLICATIONS. NEWSPAPERS.	Printing official ballot on supplement to a newspaper, which is contained in the newspaper and distributed to all subscribers, constitutes sufficient publication of the official ballot.
71-52	Oct 27	Hon. Elmer L. Pigg	WITHDRAWN
75-52	Feb 29	PRIVATE CORPORATIONS. PRIVATE BENEVOLENT ASSOCIATIONS. COUNTY COURT. PUBLIC MONEY, CONTRIBUTIONS OR GIFTS.	No county, city or other political subdivision of the State of Missouri can contribute or give any public funds to the "Executive Committee of the Greater Jefferson City Committee, Inc." as the same is a private corporation.
76-52	Oct 7	HEALTH. HOSPITALS. COUNTY COURT.	The dissolution of a county public health center can only be accomplished as provided by statute. County court without authority to reduce tax rate voted for county public health center.
77-52	Jan 10	Hon. Leo J. Rozier	WITHDRAWN
77-52	Oct 17	BOND ELECTIONS. FORM OF BALLOT. COUNTY BOND ELECTIONS.	The form of the constitutional ballot may not be used in submitting a county bond issue to the voters. The proposition should be placed on a separate ballot, printed and in the form prescribed in Section 108.060, RSMo 1949.

79-52	Feb 20	COUNTY COURTS. STOCK LAW.	Section 270.090, RSMo 1949, makes it mandatory upon a county court, upon petition of 100 householders anywhere within such county to submit the issue of invoking the stock law at a general election held in such county and it is discretionary with county court as to whether such issue is to be submitted at a special election preceding any general election. Under Section 270.130, RSMo 1949, a single township within county is not authorized to petition the county court to hold an election to invoke the stock law within such single township.
79-52	Apr 18	COUNTY COURT. LAW LIBRARY.	A county court of a county of the fourth class has no authority to establish and maintain a law library for the use of the circuit judge, prosecuting attorney and members of the county bar.
81-52	Jan 31	COUNTY SCHOOL SUPERINTENDENT. SECRETARY'S SALARY.	Salary of secretary to county school superintendent is limited to $1500 per annum. Money provided by law for traveling expenses of superintendent cannot be diverted to payment of secretary's salary.
81-52	Mar 15	ADJUTANT GENERAL. ARMORIES. APPROPRIATIONS. FUNDS.	Adjutant General authorized to accept moneys from the Federal Government to construct armories, providing the construction is accomplished by compliance with state laws relating to public works.
81-52	Apr 17	FEES. MAGISTRATE COURT. SHERIFFS. PROSECUTING ATTORNEYS.	1. In cases where a fine has been assessed against a defendant and the defendant is unable to pay the costs or fine or both, and serves out the fine in jail, or where a jail sentence is assessed, that the county is liable for the $2.50 magistrate fee. 2. In situations such as are set forth in part 1 of this conclusion, the county would not be liable to pay the fee of the sheriff or the prosecuting attorney.
81-52	June 4	BANKS.	State chartered bank in solvent condition may, with approval of Commissioner of Finance, voluntarily dissolve under provisions of general and business corporation laws, Chap. 351, RSMo 1949.
81-52	June 16	BANKS.	State banks may issue capital notes pursuant to authority contained in Sec. 362.120, RSMo, 1949, though no impairment of capital exists.
81-52	Aug 25		Opinion Letter to Major General A. D. Sheppard
81-52	Aug 26	SCHOOLS.	Teacher is not re-employed when school board votes not to re-employ teacher and written notice is given to teacher, signed by president and secretary of board.
81-52	Oct 30	Hon. D. W. Sherman, Jr.	WITHDRAWN
81-52	Nov 19	PAUPERS. COUNTY COURT. DIVISION OF	County court may designate county welfare director as its agent to distribute county pauper fund.

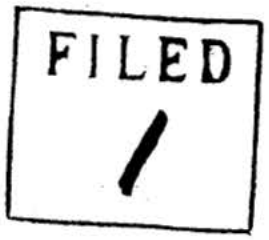
		WELFARE.	
82-52	Jan 15	Hon. Tom A. Shockley	WITHDRAWN
82-52	Apr 23	MOTOR VEHICLES. CHAUFFEUR'S LICENSE.	Section 302.010, et seq., does not require contractor driving own truck to work to have chauffeur's license.
82-52	Aug 21	ELECTIONS. GENERAL ASSEMBLY. LEGISLATURE. SENATE. STATE SENATE.	Only counties comprising old senatorial district entitled to vote in special election for senator to fill vacancy for remainder of term.
83-52	June 10	RIVERS. BOUNDARIES.	Change in channel of Missouri river by avulsion does not change former boundary line which was the center of old channel.
85-52	Oct 1	AGRICULTURE. LICENSES.	An out-of-state dealer in eggs who maintains no place of business for the sale of same within the state is not required to obtain a license under the provisions of Section 196.335, RSMo 1949; no provision exists for the collection of unpaid license fees for prior years.
85-52	Nov 19	COMMISSIONER OF AGRICULTURE. FOODS AND DRUGS.	Product containing less than 8% milk fats; or one in which milk fats have been substituted by use of non-milk type fats; and product to which such oils have been added to ingredients provided by Sec. 196.850 RSMo 1949, defining ice cream; and manufacture, sale, or offer to sell products as, or for ice cream is illegal, but manufacture, sale or offer to sell product not as or for ice cream not illegal.
85-52	Nov 21	COMMISSIONER OF AGRICULTURE. FOOD AND DRUGS.	Manufacture and sale of a frozen food product which contains vegetable fat does not violate provisions of Section 196.705, RSMo 1949.
86-52	Jan 25	AGRICULTURE. SCREENINGS – DEFINITIONS.	Section 266.270, RSMo 1949, prohibits the mixture of feed with materials appearing in the proposed definition of "Chaff and/or Dust."
86-52	Aug 18	SCHOOLS. PUBLIC SCHOOL RETIREMENT SYSTEM.	Teacher who continues to teach after attaining compulsory retirement age is entitled to receive retirement allowance upon separation from active teaching service.
88-52	Dec 18	STATE INCOME TAX. PROFITS FROM SALE OF BREEDING CATTLE. VALUATION.	Director of revenue lacks power under Section 143.200, RSMo 1949, to make regulation that profits of individual taxpayer, from sale of breeding stock or dairy cattle is to be assessed to full value unless owned 12 months prior to sale.
89-52	Jan 14	CIRCUIT CLERKS, FEES.	Clerk of the circuit court may demand payment in advance for certified copies of records in his office.

89-52	Jan 15	TAXATION. VOID TAX SALE. PURCHASER'S BID TO BE REFUNDED, WHEN	County court is authorized to refund amount of bid and interest to purchaser at void tax sale only under circumstances provided by Section 140.530, RSMo 1949. Court cannot legally refund total amount of taxes, plus interest on same to purchaser who paid taxes on land described in collector's deed for years subsequent to void tax sale.
89-52	Jan 31	ELECTIONS.	April 29th last day for filing for nomination in August primary.
89-52	Feb 15	LOTTERIES.	A transaction, whereby with the sale of an admission ticket or a sale of merchandise, a coupon would be given, entitling the holder to a chance at a prize, would be a lottery and would therefore be illegal.
89-52	Mar 4	Hon. Walter Toberman	WITHDRAWN
89-52	May 1	ELECTIONS. SECRETARY OF STATE.	Declarations of candidacy for nomination on Socialist Labor, Progressive, Christian Nationalist and Socialist Party tickets should be certified to county clerks by Secretary of State.
89-52	May 15	CIRCUIT JUDGE – TERM OF OFFICE ON APPOINTMENT TO FILL A VACANCY UNDER NON-PARTISAN COURT PLAN.	A Circuit Judge appointed to fill a vacancy under the provisions of the non-partisan court plan provided in Art. V of the Constitution of this State will hold office for a term ending Dec. 31, following the next General Election after the said Circuit Judge has been in the office for a period of twelve months after his appointment.
89-52	June 10	Hon. Walter H. Toberman	WITHDRAWN
89-52	June 13	AGRICULTURE.	Regulations 3, sub-part a and 4, sub-part a, are valid and enforceable insofar as they do not conflict with applicable federal regulations upon the same subject.
89-52	Aug 28	ELECTIONS. POLITICAL PARTIES. AMERICA FIRST PARTY.	The candidates for president and vice-president of the America First Party should be certified out by the Secretary of State for the election to be held in November, 1952.
89-52	Oct 21	ELECTIONS.	National director of political party may not withdraw names of presidential and vice presidential candidates.
89-52	Nov 12	RECORDERS. COUNTIES.	Instruments retained on file in county recorder's office for one year as required by Section 59.360, RSMo 1949, to be disposed of in manner set forth in Section 59.430 if possible, and if not so disposed of the same may be removed to any convenient and safe storage space.
90-52	Apr 3	MERIT SYSTEM. EMPLOYMENT	1) Chief Appeals Referee in Division of Employment Security not an attorney within exemption provisions of State Merit System Act; 2)

		SECURITY.	Incumbent with merit system status under Merit System Council continues to enjoy merit status.
91-52	Feb 20	Mr. Joseph P. Uxa	WITHDRAWN
92-52	Apr 1	MOTOR VEHICLES. SUSPENSION OF OPERATOR'S AND CHAUFFEUR'S LICENSES.	Sec. 302.170(3) RSMo 1949, was repealed by Amended S.C.S. for H.C.S. for House Bills 22, 49, 56 and 114, 66th General Assembly, effective Jan. 1, 1952. Sec. 302.225(4) of act grants named courts power to order suspension and revocation of operator's and chauffeur's license for causes in act. Upon conviction of offense for which license can be, and is ordered suspended, trial court must report same to Director of Revenue, who has mandatory duty to suspend license for time specified in statute. Trial court cannot order license surrendered for suspension period.
92-52	Sept 10	NONINTOXICATING BEER. ELECTION DAYS.	The sale of nonintoxicating beer on election days by persons holding licenses to sell nonintoxicating beer is legal.
93-52	May 5	OFFICERS.	The offices of mayor of a fourth class city and director of an incorporated fire district are compatible.
93-52	Oct 22	HEALTH. COUNTIES.	County public health center operating under Chapter 205, RSMo 1949, has no express or implied power to purchase site for county garbage dump.
93-52	Nov 20	COUNTIES OF FIRST CLASS. UNDER CHARTER FORM OF GOVERNMENT. COUNTY CHARTER. CONSTABLE'S SALARIES. CONSTITUTION (SECS. 18(E) AND 18(B) OF ARTICLE VI).	Salaries of constables in St. Louis County are set by County Charter.
94-52	Aug 19	SAVINGS AND LOAN ASSOCIATIONS.	Savings and Loan Association subject to provisions of Chap. 369, RSMo 1949, may not amend charter to vest power in board of directors to make, amend, alter and repeal by-laws.
94-52	Oct 31	BONDS. SEWER BONDS. ELECTIONS.	(1) Water-Sewer Revenue Bonds authorized by House Bill No. 45, 1951, need not be offered for public sale; (2) and need only a four-seventh vote.
94-52	Nov 18	TAXATION. SCHOOLS.	In computing the average school levy for railroads and other public utilities all districts including fractional districts partially within the

			county should be considered. If there has been a partial failure to levy school taxes, such may be carried in a supplemental tax book and collected as other taxes.
96-52	Feb 20	SCHOOLS. PUBLIC BUILDINGS.	School board authorized to construct school building without entering into formal contract for same. School board could make direct purchases of materials needed and employ necessary labor to do the work.
96-52	May 17	SCHOOLS. STATE AID.	Enlarged school district entitled to receive state aid as provided in Senate Bill 143 when building program was begun before effective date of said bill but will not be completed until after said date. Enlarged school district with more than 250 pupils enrolled entitled to additional building aid under Senate Bill No. 143 in carrying out an additional building program.
96-52	June 18	SCHOOLS. APPROPRIATIONS.	State Board of Education may apportion as excess school moneys one half of the biennium appropriation made by the Legislature for school purposes.
97-52	Jan 11	TIMBER. RECORDS KEPT BY PURCHASER.	Record as to the section, township and range on which timber grew is sufficient.
97-52	Jan 16	OFFICERS.	Officers whose residence is five or more miles from point where he serves as a witness is entitled to receive witness fees.
97-52	Oct 27	ELECTION JUDGES. CANDIDATES FOR OFFICE.	A candidate for office cannot serve as an election judge at the election in which he is a candidate.
99-52	May 23	COUNTY COURTS. ADJOURNED TERMS.	Two judges constituting a quorum for doing business under Section 49.070 RSMo 1949, may legally call an adjourned term of county court on Saturday following adjournment of regular term the previous day, under authority of Section 49.200 RSMo 1949.

STATE BOARD OF ACCOUNTANCY: EFFECTIVE DATE OF HOUSE BILL #449 of 66th GENERAL ASSEMBLY NOW SECTION 326.200 RSMO 1949: COMPENSATION OF BOARD MEMBERS: Effective date of House Bill No. 449 was October 9, 1951; and that the members of the State Board of Accountancy appointed prior to October 9, 1951, shall not receive the increase of compensation allowed in H.B. 449, supra, during their present terms of office.



April 23, 1952

Missouri State Board of Accountancy
209 Monroe Street
Jefferson City, Missouri

Gentlemen:

Your request for an official opinion of this office has been referred to me for reply. Your request reads as follows:

> "The Missouri State Board of Accountancy would appreciate the opinion of your office as to the construction of section 326.200 relative to the compensation of board members which was altered by house bill 449, enacted by the 66th General Assembly, to increase the fees of the board members from five dollars a day to ten dollars a day.
>
> "Will you please advise the board as to when this bill went into effect, and whether or not this additional compensation may be paid immediately. We would like for you to keep in mind that members of the board are appointed for terms that overlap the terms of other members, and if the increase may be paid only to successors of the present members, there will be considerable confusion in regard to the payments during the years some of the members will receive the increase and others will not."

House Bill No. 449 of the 66th General Assembly was truly agreed to and finally passed without any emergency clause and was therefore not in effect on or before the 11th day of July, 1951. The same was approved and signed by the Governor on July 31, 1951. On June 15, 1951, there was passed by the General Assembly of Missouri, House Concurrent Resolution No. 12, which reads:

> "Whereas, Section 29, Article II of the Constitution of 1945 provides that if the General Assembly recesses for thirty days or more it may prescribe by joint resolution that laws previously passed and not effective, shall take effect ninety days from the beginning of such recess and,
>
> "Whereas, the 66th General Assembly has resolved to recess for a period beginning July 11, 1951, and ending August 15, 1951,
>
> "Now, therefore, be it resolved by the House of Representatives and Senate jointly, that all laws passed by the 66th General Assembly of the State of Missouri, on or before the 11th day of July, 1951, and not effective, shall take effect ninety days from the beginning of said recess, that is to say, shall take effect and be in force on the 9th day of October, 1951."

From this resolution it is our opinion that House Bill No. 449, supra, repealed former Section 326.200, RSMo 1949, and enacted a new section, Section 326.200, which was effective as of October 9, 1951, and which raised the compensation of the members of the State Board of Accountancy from $5.00 to $10.00 per day.

Section 326.160, RSMO 1949, dealing with State Board of Accountancy--Members--Qualifications--Terms--is in part, as follows:

> "1. Within sixty days after the taking effect of this law, the governor shall appoint five suitable persons, by and with the advice and consent of the senate, who shall constitute a board by the name and style of the 'Missouri State Board of Accountancy,' with the functions, powers and duties herein prescribed.
>
> "2. Each member of said board, both those initially appointed and all successor appointees, shall be the holder of a certificate as a certified public accountant, issued pursuant to and under the laws of this state; and shall, at the time of his appointment, be a resident of this state;

> and have practiced continuously in this state, as and under the designation of a certified public accountant, or as a public accountant, for a period of at least five years immediately preceding his appointment.
>
> "3. The term of one of the initial appointees shall expire with July first of the calendar year immediately succeeding that in which his appointment was made; and the terms of the other initial appointees shall expire, respectively, with the first day of July, one, two, three and four years after the expiration of the shortest term aforesaid. Upon the expiration of each of said initial terms, the term of office of each member thereafter appointed shall be five years. Vacancies shall be filled by the governor for the unexpired term. Every member shall, however, hold office until his successor is appointed and qualified. No member whose term shall have expired, or been terminated for any reason, shall be eligible for reappointment for a period of two years.
>
> "4. To every member appointed by the governor there shall be issued a commission or certificate of appointment; and every appointee, before entering upon his duties, shall take the oath of office required by the constitution of all officers under the authority of this state.
>
> "5. Any member of the board may be removed by the governor for misconduct, incompetency or neglect of duty; provided, he shall first be given an opportunity to be heard in his own behalf." (Underscoring ours.)

Thus, after a reading of the above statute, we observe that, under part 3 thereof, it states that: "the term of each member thereafter appointed shall be five years." Therefore, the statute clearly shows that the member has a specific term of five years and as such we conclude that he is an officer of the state within the meaning of Article VII, Section 13, Constitution of Missouri, 1945. Further, we note after a study of part 5 that any member of the Board may be removed by the Governor for the reasons given therein but that he shall first have been given an opportunity to be heard in his own behalf. Therefore, it is our opinion that the Board members, as officers of the state, have a definite term and cannot be removed except for cause upon a hearing first being had by the Governor.

Missouri State Board of Accountancy

Article VII, Section 13 of the Constitution of Missouri, 1945, reads as follows:

> "Sec. 13. Limitation on Increase of Compensation and Extension of Terms of Office.--The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

In accordance with the above provision of our present Constitution and a similar one of the Constitution of 1875, Article XIV, Section 8, our courts have many times held that officers, such as the members of the State Board of Accountancy, have a set and definite term of office and are not entitled to any increase in their compensation during that term of office.

This reasoning is the reason for our opinion here holding that members of the State Board of Accountancy, who were appointed prior to the 9th day of October, 1951, are not entitled to the increase in compensation during their terms of office, but we are of the opinion that anyone appointed to said Board after the aforesaid 9th day of October is entitled to the increased compensation granted by House Bill No. 449 of the 66th General Assembly, supra.

CONCLUSION

It is, therefore, the opinion of this department that the effective date of House Bill No. 449, supra, was October 9th, 1951; that the members of the State Board of Accountancy, appointed prior to October 9, 1951, shall not receive the increase granted by House Bill No. 449, supra, during their present terms of office; and that any member appointed to the State Board of Accountancy after October 9, 1951, shall be entitled to the increased compensation mentioned in House Bill No. 449, supra, being the sum of $10.00 for each day devoted to the affairs of the Board.

Respectfully submitted,

A. BERTRAM ELAM
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ABE:mw

PROSECUTING ATTORNEY,)
)
VACANCY IN OFFICE:)

A prosecuting attorney in one county may serve also as prosecuting attorney in another county under appointment to fill a vacancy.

May 2, 1952

5/7/52

FILED
1

Honorable Ray Adams
Representative of Reynolds County
House of Representatives
Jefferson City, Missouri

Dear Mr. Adams:

We have given careful consideration to your request for an opinion contained in your letter in which you wanted to know if a prosecuting attorney of one county could legally hold the office of prosecuting attorney in another county under appointment to fill a vacancy/when no resident lawyer could or would accept the appointment.

The qualifications for a person elected to the office of prosecuting attorney are contained in Section 56.010, RSMo 1949, which provides, among other things, that he must have been "a bona fide resident of the county in which he seeks election for twelve months next preceding the date" of the election at which he is a candidate.

There is another statute, however, which applies to the appointment of a person to fill a vacancy in the office of prosecuting attorney. This is Section 105.050, RSMo 1949, which is as follows:

> "If any vacancy shall happen from any cause in the office of the attorney general, circuit attorney, prosecuting attorney or assistant prosecuting attorney, the governor, upon being satisfied that such vacancy exists, shall appoint some competent person to fill the same until the next regular election for attorney general, prosecuting attorney

> or assistant prosecuting attorney, as the case may be; provided, in the case of a vacancy in the office of prosecuting attorney, if there is no qualified person in the county who can or will accept such appointment, then the governor may appoint any person who possesses all the qualifications set forth in section 56.010, RSMo 1949, except the qualification as to residence."

This settles the question as to residence, and the only remaining matter for consideration is whether or not the same person may hold the two offices at the same time. There is a common law rule which holds that a person cannot serve in two or more offices at the same time when the duties and functions of the offices are inconsistent or incompatible.

The high courts of this state have in numerous cases defined this principle. The St. Louis Court of Appeals, in Bruce v. City of St. Louis, 217 S.W. (2d) 744, l.c. 748, said:

> "The limitation at common law upon the holding of two or more offices at one and the same time extends no farther than to prohibit the holding of incompatible offices. Any further inhibition must be constitutional or legislative. * * *"

The two offices of prosecuting attorney could not by any stretch of the imagination be considered incompatible, for the duties and functions are exactly the same in the two counties. Moreover, there is no constitutional or statutory inhibition in Missouri to keep the same person from holding the two offices at the same time.

CONCLUSION

It is the opinion of this office that a prosecuting

Honorable Ray Adams

attorney in one county may serve also as prosecuting attorney in another county under appointment to fill a vacancy when there is no qualified person in the county who can or will accept such appointment.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

BAT/fh

TAXATION:
CREDIT INSTITUTIONS:
PARTNERSHIPS:

Par. 3, Sec. 148.150 RSMo 1949 of Credit Institutions Tax Act of 1946, construed by general rule of statutory construction. Read, construed and harmonized with subsequent uniform Partnership Act. Former law construed strictly against state; deduction of said statute construed strictly against taxpayer. Partnership Act prohibits parties from drawing salary, hence in arriving at net income taxable to partnership under Credit Institutions Tax Act, partners salaries not deductible under Par. 3; Sec. 148.150, thereof.

FILED

August 25, 1952

8-29-52

Mr. T. R. Allen,
Supervisor, Income Tax
Department of Revenue
Jefferson City, Missouri

Dear Sir:

Your recent request for a legal opinion of this department has been received and reads as follows:

"Re: Partnership operation
of credit institutions

"In the administration of the credit institution tax, a question has arisen with regard to the interpretation of the Law as set out in Section 148.150, Paragraph 3, R.S.Mo 1949, and a ruling is desired in connection with the interpretation of certain phraseology included therein with regard to a partnership operation, the taxpayer in the case involved being the A.B.C. Finance Company of Kansas City, Missouri, which is a partnership consisting of four partners.

"Two of these partners devote their full time to the running of the business and as payment therefor are paid $700 a month each. Taxpayer complains in studying the Act that they can find no distinction made between corporations or partnerships and the Act states that in computing net income, there is provided 'reasonable allowance for salaries and other compensation for personal service actually rendered.' (Underscoring ours)

"This Department has refused to permit the deduction herein referred to salaries to be claimed for partners as a deduction in arriving at net taxable income for

the purpose of the credit institution tax. Taxpayer claims that to allow such a deduction to a corporation and not allow it to a partnership would be discriminatory. The contention of this Department is that a partner of any business may not draw a salary and that under the provisions of the Act that such an item could not be classified as ordinary and necessary expense paid or incurred by the taxpayer.

"Will you kindly advise whether in your opinion such a deduction as herein referred to would be within the meaning of the Statute for the purpose of arriving at taxable income for credit institution tax."

The opinion request calls for an interpretation of paragraph 3 of Section 148.150, RSMo 1949, which is a part of what has been termed the "Credit Institutions Tax Act of 1946." This section allows the taxpayer certain deductions in computing net income subject to the tax, and reads as follows:

"In computing net income there shall be allowed as deductions all ordinary, and necessary expenses paid or incurred by the taxpayer during the income period in carrying on its trade or business in the State of Missouri. Without limiting the generality of the foregoing there shall be allowed as deduction: A reasonable allowance for salaries and other compensation for personal services actually rendered; rents, repairs, bad debts and debts ordered to be charged off by the commissioner of finance; interest, cost of insurance and advertising; all taxes paid or accrued during the income period to the United States and all taxes paid or accrued on real estate to the state of Missouri or any political subdivision thereof; all contributions paid or accrued pursuant to the unemployment compensation law of Missouri; reasonable allowances for depreciation and depletion; armortization of premiums on bonds, debentures, notes or other securities or evidences of indebtedness; a reasonable allowance for payments or contributions to or on account of any pension or retirement fund or plan for its officers or employees; contributions to any corporation, association or fund organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual

> to an amount which does not exceed five per cent of the taxpayer's net income as computed without the benefit of this deduction; losses from the sale or disposition of any property, real or personal, tangible or intangible; and all other losses sustained during the income period not compensated for by insurance; provided, however, that deductions allowed to pawnbrokers shall be the same per cent of the total deductions allowable under this section as the total volume of their loan business bears to the total volume of their loan and merchandise business combined."

The opinion request does not state whether the salaries thus paid are in addition to the share of profits of the business to which these partners, along with the others are entitled, but it is assumed that the salaries are paid in addition to the share in the firm's profits received by the salaried partners.

The term "taxpayer" as used in above mentioned Credit Institutions Tax Act, has been defined by paragraph 6, Section 148.130 RSMo 1949, to mean any credit institution subject to the tax provided by said act, and the term "credit institution," has been defined by paragraph (2) of said section and reads as follows:

> "(2) The term "credit institution" means every person, firm, partnership or corporation engaged principally in the consumer credit or loan business in the making of loans of money, credit, goods, or things in action, or in the buying, selling, or discounting of, or investing in negotiable or non-negotiable instruments given as security for or in payment of the purchase price of consumer goods. Without limiting the generality of the foregoing, the term "credit institution" shall include persons, firms, partnerships, and corporations, operating or licensed under the small loan laws of this state, or under the laws of this state relating to loan and investment companies, and pawnbrokers, but shall not include banks, trust companies, credit unions, insurance companies, mutual savings and loan associations, savings and loan associations or real estate mortgage loan companies; * * *."

The courts have never passed upon the proposition embodied in your inquiry, and the meaning intended to have been given this section by the legislature will have to be determined by the general rules of statutory construction.

While taxing statutes are to be construed strictly against the taxing authority and liberally in favor of the taxpayer, it has long been the rule in Missouri that a taxpayer who claims to be entitled to an exemption from taxes has the burden of proving that he unmistakeably falls within the class of taxpayers specifically exempted from the payment of the taxes. This general rule was stated to be the law in the case of In Re: First National Safe Deposit Company 351 Mo. 423, in which the court said at l. c. 427:

> "It is the general rule that taxing statutes are to be strictly construed in favor of the taxpayer, and against the taxing authority; but this does not extend to exemption provisions of such statutes. The applicable rule in the latter connection is as stated in State ex rel. St. Louis Y.M.C.A. v. Gehner, 320 Mo. 1172, 11 S. W. (2d) 30: ' . . . no such exemption can be allowed, except upon clear and unequivocal proof that such release is required by the terms of the statute. If any doubt arises as to the exemption claimed, it must operate most strongly against the party claiming the exemption. . . . "Such statute and constitutional provisions are construed with strictness and most strongly against those claiming the exemption . . . . the burden is on the claimant to establish clearly his right to exemption." . . . "/See, also, State ex rel. Spillers v. Johnston, 214 Mo. 656, 113 S. W. 1083; 1 Cooley on Taxation (3d Ed.) 357-358./"
>
> (Underscoring ours.)

We cannot and do not agree with the taxpayer that the salaries of the partners are proper legal deductions against the tax, and that Section 148.150, supra, is broad enough to include such deductions. It is obvious that in construing paragraph 3 of this section the legislature never intended it to have the meaning ascribed to it by the taxpayer, for to construe it thus, one must necessarily presume that the legislature was ignorant of the laws pertaining to partnerships at the time of the enactment of said section. One must also presume that the legislature subsequently passed the Uniform Partnership Act, certain provisions of which (to be hereinafter noted), were intended to be in conflict with Section 148.150 supra, if the interpretation placed upon said section by the taxpayer is correct.

One cannot presume that the legislature did not know the law pertaining to partnerships, or of taxation at the time of the passage of the section under consideration, for such presumption

would be in conflict with certain well established principles of law to the contrary. Regarding presumptions, the St. Louis Court of Appeals, in the case of Sikes v. St. Louis & S.F.R. Co., 127 Mo. App. 326, at l. c. 334, said:

> "In examining this statute and seeking to arrive at the legislative intention therein manifested, we must do so with the knowledge that the Legislature is presumed to know the existing state of the law relating to subjects with which they deal at the time they act on a given question, and therefore are deemed to have dealt with the matter in the light of the state of the law then existing. * * * *"
>
> (Underscoring ours)

Therefore, we must presume that the legislature knew the laws pertaining to taxation at the time of the passage of Section 358.180 supra, and did not intend that the Uniform Partnership Act, should be in conflict with any of the previously established principles of law pertaining to taxation or of partnerships, particularly the provisions of the Credit Institutions Tax Act.

In Missouri, a partnership has long been recognized as a contractual relationship between two or more competent persons by which they pool their money, effect, labor, skill, some or all of them into a business and divide the profits and bear the losses in certain proportions.

It is apparent that in the legal contemplation, of partnerships, a partner is an owner, and, in a general partnership, such as the one mentioned in the opinion request, each partner is authorized to act for the partnership and to bind the firm within the scope of its business. The individual partners are the owners, and aside from them the partnership has no separate existence, and is not a legal entity. This principle of law was decided in the case of Chambers v. Macon Wholesale Grocer Co. et al., 70 S.W. (2d) 884. We quote from a portion of the opinion found at l.c. 889:

> "* * * * That a partner is solely an owner and employer, and not an employee, within the meaning of our act, would seem to be true from the very nature of a partnership as well as from the terms of the act. A partnership is not an entity apart from the individuals composing it. 47 C. J. 947, Sec. 457; 20 R.C.L. 799-806, Secs. 1-6. Certainly no one would contend that a partner who was injured

by some defective condition of partnership property or by negligence of a partnership employee could recover from the other partners, who did not participate directly in the act, for the fault would be his as much as theirs. The partners own the property and the business individually just the same as if one of them owned it all, although their ownership is subject to the rights of all. 47 C. J. Secs. 176, 188, 805; 20 R.C.L. 850, Sec. 56; 20 R.C.L. 870, Sec. 81. There is a difference, however, between mere joint ownership of property and partnership ownership (20 R.C.L. 806, 807, Secs. 7, 8), and that is the distinction between the Ellis Case and sharp v. Carswell, S. C. 391, 47 S. L. R. 335, 3 B.W.C.C. 552, cited by respondent. 'A partner cannot maintain an action at law against his copartners for services rendered or for premises leased to the firm, although the partnership agreement secures to him a fixed sum therefor; * * *nor for money loaned to or paid for the firm'; because 'it would be useless for one partner to recover what, upon taking a general account among all the partners he might be liable to return'; and because 'such transactions do not result in one partner becoming a debtor to or creditor of the others.' Burdick on Partnership, 333. Accordingly, the remedy of a partner is an action in equity for an accounting whereby he is entitled to have his claim considered in the distribution of the partnership property. 47 C.J. 802, Sec. 250; 20 R.C.L. 873, Sec. 84, 924, Sec. 139. Even a cause of action against third persons is a partnership asset, and all partners must ordinarily join in the suit. 20 R.C.L. 920, Secs. 132, 133.

"Besides the partner's personal ownership of the business, in all partnership affairs, each partner acts, or has authority to act, both as principal for himself and as agent for the other partners, while an agent, servant, or other employee does not act for himself but for his principal alone; an agent being employed to bring about contractual relations between his principal and third persons, not between such persons and himself, while a servant is employed only to deal with things on behalf of and as directed by his master, not for his own purposes. 2 C. J. 423 and 425, Secs. 9

> and 12; 20 R.C.L. 882, Sec. 94. It would therefore seem evident that, as the Ellis Case so well states, whether a partner receives only a fixed share of profits or, because he puts in more of his time than the others advancing their joint activities, 'receives sums which are called wages, it really does not create the relation of employers and employed, but is, in truth, a mode of adjusting the amount that must be taken to have been contributed to the partnership assets by a partner who has made what is really a contribution in kind, and does not affect his relation to the other partners, which is that of co-adverturer and not employee.
> * * * * * * * * * * * * * * * * * * "

We also quote paragraph 6, Section 358.180, giving the rules for determining the rights and liabilities of general partners under Uniform Partnerships Law, RSMo 1949, which provides that no partner can be paid a salary for his services in performing partnership business, and reads as follows:

> "No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs;"

The interpretation of Section 148.150 by the taxpayer cannot be given effect, for to do so would be to nullify the provisions of the Uniform Partnership Act quoted above, and such an interpretation would be unreasonable and contrary to the intention of the legislature in the passage of Section 148.150, supra. Said section was passed by the Sixty-fourth General Assembly, while the Uniform Partnership Act was passed by the Sixty-fifth General Assembly. The quoted portion of the partnership law clearly states that a partner shall not receive any remuneration for performance of partnership business except he shall be entitled to reasonable compensation for his services in winding up the partnership affairs.

We do not believe there is any conflict between the provisions of the two statutes noted above, nor do we believe that the legislature intended there should be any conflict between the two. However such a conflict would unavoidably be the result if the interpretation of Section 148.150 supra, given by the taxpayer is correct. In determining the actual intention of the legislature in the passage of Section 148.150 supra, and placing the proper construction on the section thus intended, it is our thought that said section

should not be read alone but that it should be read along with Section 358.180, with a view of harmonizing and giving effect to both sections. This theory was held to be one of the guiding maxims to be observed in interpreting seemingly conflicting statutes in the case of McGill v. City of St. Joseph, 38 S.W. (2d) 725, in which the court said at l. c. 727-728:

> "In the case Kane v. Kansas City, Ft. S. & M. Ry. Co., 112 Mo. 34, 39, 20 S.W.532, 533, the court said: 'It is a recognized rule of rational interpretation of laws that, where two interfere in their application to particular facts, we should follow that which is recommended by the most beneficial reasons. * * * It is proper to inquire into the consequences of any proposed interpretation of a law in determining what was the probable intention in its enactment. * * * That the letter of a statute must occasionally be cut down to conform to its evident spirit and intent is a maxim of interpretation which is not new in Missouri.' In the interpretation of laws, it is the duty of all courts to ascertain the intention of the lawmaking power. 'To gather that intention, the courts are not confined exclusively to the consideration of the immediate statute in question, but many look to other legislation in part materia.' Manker v. Faulhaber, 94 Mo. 430, 442, 6 S.W. 372, 376. A statute should not be construed as if it stood alone and complete in itself. Glaser v. Rothschild, 221 Mo. 180, 120 S.W. 1, 22 L.R.A. (N. S.) 1045, 17 Ann. Cas. 576. And, where two statutes are susceptible of a construction that will give force to both, they must be so construed. State ex rel.v. Clayton, 226 Mo. 292, 126 S.W. 506."

CONCLUSION

It is the opinion of this department that in arriving at

the net income of a partnership subject to taxation under the Credit Institution Tax Act, the amount paid to partners for managing the firm's business is not an ordinary, necessary and reasonable expense incurred by the partnership for personal services within the meaning of paragraph 3, Section 148.150 of said Act, and is not allowable as a deduction thereunder.

Respectfully submitted

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:

J. E. TAYLOR
ATTORNEY GENERAL

PNC:A

PROBATE COURTS: RESTORATION OF SANITY PROCEEDINGS: JURISDICTION OF:

State patient in state school sent under provisions of Sec. 202.160 RSMo 1949, never adjudged insane previously to admission, who subsequently files petition for restoration of sanity and discharge from school under provisions of Sec. 458.530 RSMo 1949, in probate court of patient's residence should have petition dismissed, since court lacks jurisdiction over subject matter and person of petitioner.



September 22, 1952 10-31-51

Honorable A. R. Alexander
Judge of the Probate Court
Plattsburg, Missouri

Dear Sir:

Your recent request for a legal opinion of this department calling for an interpretation of Sections 202.610, 202.630 and 458.530 RSMo 1949, and an application of these statutes to the facts given in your letter has been received. The specific inquiries read as follows:

> "(1) Does Section 202.630 give the superintendent of the State School at Marshall such continuous control over said patients as to prevent the Probate Court from exercising any jurisdiction?
>
> (2) Is the Commitment by the County Court, under Section 202.630, such a finding of insanity as gives the Probate Court jurisdiction to hold an inquiry for restoration under the provisions of Section 458.530?"

Upon our request that above inquiries be clarified, we received a reply from you which reads in part as follows:

> "In view of your closing paragraph, probably an opinion on query (2) may satisfy both queries. It may be resolved into this form:
>
> "Keeping the provisions of Section 202.630 in mind, does Section 458.630 give the probate court authority to hold an inquiry for restoration of patients committed to the State School at Marshall by a County Court under the provisions of Section 202.610?"

Evidently the reference to the section number in the preceding paragraph was intended to refer to Section 458.530 which provides the procedure to be followed in restoration proceedings, rather than Section 458.630 as stated. We shall therefore treat the reference as being Section 458.530. RSMo 1949.

Section 202.610 RSMo 1949, sets out the necessary procedure for having feeble-minded and epileptic persons admitted into the state schools for treatment. Said section may be summarized as follows: A written application must be made by those desiring the admission of one into a state school. The application must state the prospective patient's age, place of nativity, if known, christian and surname, town, city or county of such person's residence; ability of parents or others to provide for patient's support in whole or in part, and if in part, what part; degree of relationship or other circumstances of connection between patient and person desiring patient's admission. The statement in all cases of state patients (those in which the parents or others are unable to pay for patient's treatment in the school, and county of patient's residence pays same) must be verified by affidavit of petitioner and the disinterested persons, together with the opinion of two qualified physicians, all residents of the same county as patient, and acquainted with circumstances thus stated, and who must be certified as credible and that the patient is an eligible and proper person for admission, by the county court, or the hospital commissioner, or his assistant of St. Louis City, respectively, as the case may be.

An official application for admission of state patient may also be made by any judge of a court of record of the county of the patient's residence, which county shall be liable for payment of five dollars per month to the state school into which the patient is admitted.

The object of state schools has been given in Section 202.600 RSMo 1949, which reads as follows:

> "The objects of such school shall be to secure the humane, curative, scientific and economical treatment and care of the feeble-minded and epileptics, exclusive of dangerous insane epileptics, to fulfill which design there shall be provided, among other things, a tract of fertile and productive land in a healthful situation, with an abundant supply of wholesome water, sufficient means of drainage and disposal of sewerage, and sanitary conditions; and there shall be furnished, among other necessary structures, cottages and dormitory and domiciliary uses, buildings for an infirmary, a schoolhouse and a chapel, workshops for the proper teaching and productive prosecution of trades and industries; all of which structures shall be substantial and

> attractive, but plain and moderate in cost, and arrangedon the colony or village plan."

When this section is read and interpreted with Section 202.610, supra, it is apparent that state schools are not institutions for treatment of the insane. In fact no mention is made in this section of the insanity of the prospective patient, or that he may be sent to a state school for treatment of such ailment.

Section 458.020, Cumulative Supplement, RSMo 1951, is the section which authorizes the holding of sanity hearings in probate courts and reads as follows:

> "If information in writing, verified by the informant on his best information and belief, be given to the probate court that any person in its county, or any person eligible for care and treatment by the Veterans Administration or other agency of the United States government be found in the county, or on any federal reservation within the exterior boundaries thereof, is an idiot, lunatic or person of unsound mind and incapable of managing his affairs, and praying that an inquiry be had, the court, if satisfied there is good cause the facts to be inquired into by a jury; provided, that if neither the party giving the information in writing, nor the party whose sanity is being inquired into call for or demand a jury, then the facts may be inquired into by the court sitting as a jury."

When a comparison of Sections 202.610 and 458.020, supra, is made it is readily seen that on application for admission of a patient into a state school under the former section is not a petition for a sanity hearing under the latter section; each section covers entirely different subject matters and procedures, and each section operates independently of the other.

From the facts given in the opinion request it appears that a petition was made to the County Court alleging that certain persons were proper persons for admission into a state school and that said persons should be sent (apparently as state patients) to such school. The further contents of said application for admission are not disclosed, but for the purposes of our discussion, it is assumed that the application was in proper form and complied with the statutes and that the allegations of said application were found to be true by the county court as evidenced by its order, committing said patients to the State School at Marshall, Missouri.

From the facts thus given it does not appear that the sanity of the patients, or either of them was ever in question, nor does it

appear that they were adjudged to be insane under the provisions of Section 458.020, supra.

The opinion request specifically states:

> "* * *there is no record that this court or any court, so far as is shown, ever found said persons, or either of them to be of unsound mind * * *."

It has long been a legal principle that the law, in the absence of evidence to the contrary presumes every person to be sane and to understand and intend the natural and probable consequences of his voluntary acts. This principle has been recognized and declared to be in force in Missouri in the case of Reynolds v. Casualty Co. 274 Mo. 83, in which the court said at l.c. 96:

> "The sole question going to the merits of the case is whether the plaintiff's intestate died from the effect of a gunshot wound inflicted accidentally or whether the same wound was inflicted by himself voluntarily for the purpose of producing the injury. The question of sanity or insanity, is not involved, because the presumption is that every person is sane until the contrary is shown by evidence; and here there is no evidence, either direct or circumstantial that he was insane. * * *"

Therefore, in view of the above facts and applicable legal principle, each of the persons must be presumed to be sane. Under such circumstances the question has arisen as to whether or not the probate court has jurisdiction of a proceeding for restoration of sanity of said persons, and, if the court has jurisdiction, and should hold such a hearing, which might result in a finding of sanity of said persons, could the court then order them discharged from the custody of the state school.

The word "jurisdiction" has often been held to mean the power of a court to take cognizance of and to decide a case, and to carry its judgment into execution.

In discussing the proposition as to when a court obtains jurisdiction, in the case of United Cemeteries v. Strother, 119 S.W. (2d) 762, the Supreme Court said at l.c. 765:

> "* * *A court obtains jurisdiction of the subject matter by operation of law, and cannot acquire it by appearance, answer, contesting the proceedings, consent, waiver, or by the doctrine of equitable estoppel. It

> is the uniform rule of this state that jurisdiction as to the subject matter of any suit cannot be waived in any manner, and a judgment in such case is absolutely null and void, and may be set aside and for naught held, even in a collateral proceeding. Springfield Southwestern Railway Company v. Schweitzer, 246 Mo. 122, 151 S.W. 128; City of St. Louis v. Glasgow, 254 Mo. 262, 162 S.W. 596; State ex rel. Kelly v. Trimble, 297 Mo. 104, 247 S.W. 187, 1009."

With reference to the jurisdiction of a probate court in Missouri, the court said in the case of Dietrich v. Jones, et al., 53 S.W. (2d) 1059, at l.c. 1061:

> "As is said by the Supreme Court in the case of State ex rel. Barlow v. Holtcamp, 322 Mo. 258, 14 S.W. (2d) loc. cit. 650:
>
> "'The probate court is a court of limited jurisdiction, possesses only such power as is conferred upon it by statute, and can exercise its jurisdiction only in the manner prescribed by statute.' St. Louis v. Hollrah, 175 Mo. 79 85, 74 S.W. 996, 998.
>
> "'Whenever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative, namely, that the thing shall not be done otherwise.' 25 C.J. 220, note 16(c).
>
> "'The Constitution and the statutes have particularized the several things which may be done by probate courts, and we think their jurisdiction is necessarily confined to such suits and proceedings as they have been granted power to adjudicate.' State ex rel. Baker v. Bird, 253 Mo. 569, 580, 162 S.W. 119, 122 (Ann. Cas. 1915C, 353)."
>
> (Underscoring ours.)

The probate courts have been granted the power to hear and determine proceedings for restoration of sanity under the provisions of Section 458.530, as noticed above. But since such courts are courts of limited jurisdiction, and in view of the holdings in the cases previously cited, the question of whether the court had jurisdiction of a matter under that section, and the legality of the proceedings held, is in reality a question as to whether the provisions of said section have been complied with.

In this connection we call attention to the general rule that such a hearing is a special proceeding of a summary nature, and is not a new procedure. It is a continuation of a former proceeding, namely, one in which a person was adjudged to be of unsound mind, and who subsequently seeks (by himself, or through another) to have his sanity restored. This general rule in effect in most states, is also the rule in Missouri as indicated by the court in the following cases: State v. McGuillin, 246 Mo. 587, in which the court said at l.c. 595:

> "Decrees of probate courts adjudging persons to be of unsound mind are entirely unlike ordinary judgments. No appeal lies from such decrees, for the reason that by statutes they remain in fieri, like a suit pending, and may be reopened and set aside at any subsequent term of the court when the insane person shall be restored to his right mind. (Sec. 519 R.S. 1909; Dutcher v. Hill, 29 Mo. 271, l.c. 274; * * *)."

If the restoration proceeding relates back, and is a continuation of a prior proceeding in which a person was adjudged to be of unsound mind by the probate court, then the jurisdiction of the court in the restoration proceeding would also relate back to the former proceeding. If the court has no jurisdiction of a restoration matter before it, and it had no jurisdiction at the time of the adjudication of insanity, then it never can legally acquire such jurisdiction and any action taken in the restoration matter will be null and void.

Section 458.530, supra, begins:

> "For and on behalf of any person previously adjudged to be of unsound mind by any court in the State of Missouri, there may be filed in the probate court of the county wherein the person was adjudged insane, a petition in writing, * * *."

It is readily seen that the statute applies only in those instances when one has been previously adjudged insane, and that this is more than a directory statutory requirement. It is our thought that such a previous insanity adjudication is a mandatory requirement of the statute and must be strictly complied with before the probate court could legally acquire jurisdiction of the subject matter, or of the person in the restoration proceeding.

In the present case it is admitted that the persons in question have never been adjudged to be of unsound mind, and it appears that the provisions of Section 458.530 relating to such adjudication

have not been complied with and at this late date cannot be complied with insofar as the court acquiring jurisdiction of the restoration proceeding is concerned.

In view of the foregoing it is our thought that the probate court has no jurisdiction of the restoration proceedings under the circumstances mentioned in the opinion request. Since the court lacks jurisdiction to hold the proceeding, we find it unnecessary to discuss or pass upon the other inquiries contained in said request.

CONCLUSION

It is the opinion of this department that one sent to a state school as a state patient under provisions of 202.160 RSMo 1949, and never adjudged to be of unsound mind previously to his admission, and who subsequently files a petition for restoration of sanity, and discharge from said school, in the probate court of the county of patient's residence, under provisions of Section 458.530, RSMo 1949; the petition should be dismissed since the court lacks jurisdiction over the subject matter and the person of the petitioner.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PNC:hr

STATE BOARD OF ACCOUNTANCY-- The Missouri State Board of Accountancy has no power under the statutes of this State to reinstate a license of a person, firm partnership, or corporation which the Board has revoked.
Licenses:

FILED
1

September 24, 1952

10-14-52

Missouri State Board of Accountancy
209 Monroe
Jefferson City, Missouri

Gentlemen:

This will be the opinion you requested from this Department by letter in regard to the power of the Board to reinstate the license of Mr. Raymond W. McKee to practice Public Accountancy in this State, his former license issued in this State having been revoked by your Board on November 21, 1938. Your letter requesting the opinion reads as follows:

> "The Missouri State Board of Accountancy has received a request from Mr. Raymond W. McKee, Los Angeles, California, that his Missouri certified public accountant certificate number 174, dated November 15, 1922, be reinstated. Mr. McKee's certificate was revoked by the Missouri Board on November 21, 1938.
>
> * * * * * * * * * * * * * * * *
>
> "The Missouri Board is desirous of reinstating Mr. McKee's certificate, and would appreciate the opinion of your office as to whether we are empowered to do so."

Section 326.020 of Chapter 326, RSMo 1949, prohibits every person, firm partnership or corporation from practicing Public Accountancy in this State as a Certified Public Accountant, or as a Public Accountant, except as provided in Section 326.050 of said Chapter, unless such person, firm, partnership or corporation shall have been granted a certificate by the Missouri State Board of Accountancy and secured a permit for the current year.

Section 326.130 of said Chapter defines the powers and jurisdiction of the Board in the performance of the duties imposed upon the Board by said Chapter. In order to arrive at a clear understanding of the powers of the Board, we believe Sections 1 and 3

of said Section 326.130 must be read and construed together in determining whether the Board does have the power to reinstate a license previously revoked by the Board. Said Sections 1 and 3 of said section and chapter read as follows:

> "1. The Missouri state board of accountancy may either refuse to issue or may refuse to renew or may suspend or may revoke and cancel any certified public accountant certificate or public accountant registration certificate and any permit to practice public accountancy issued under the law of this state or may censure the holder of such certificate or permit, for any one or any combination of the following causes, either on its own motion or on complaint of any person:
>
> *
>
> "3. The board shall have the power to determine all matters herein placed within its jurisdiction, and its determination shall be final and conclusive, except that such determination may be reviewed by the circuit court of the county in which such proceedings were had, by appeal, the board may in its discretion when a review of its findings is requested by the accused by appeal permit the accused to practice pending the final decision of the circuit court. If the proceedings of the board be sustained or affirmed by the circuit court, the orders, decisions or judgments of the board shall be final and conclusive, if however the circuit court on such appeal reverse, annul or otherwise modify the decision of the board, the board shall record such fact in its records and conform its decision as ordered by the circuit court."

Since your letter says nothing about an appeal, and since the license of Mr. McKee was revoked by your Board on November 21, 1938, and there is no recital in your letter that an appeal was taken, we take it that there was no appeal from the order of the Board and that the order of the Board revoking said license became final.

Said Section 3, supra, provides that: The board shall have the power to determine all matters "herein" placed within its

jurisdiction, and its determination shall be final and conclusive, except that such determination may be reviewed by the circuit court of the county in which such proceedings were had, by appeal, and unless, if such determination be not affirmed, the circuit court on such appeal reverse, annul or modify the decision of the board, and if this be done the board shall record such fact in its records and conform its decision as ordered by the circuit court. We must turn to said Section 1, supra, to determine what matters are placed within the jurisdiction of the board as referred to in said Section 3, that is to say, what power is conferred upon the board and what proceedings the board may follow in the exercise of such powers as are expressly given to the board. Said Section 1 provides that the board "may either refuse to issue or may refuse to renew or may suspend or may revoke and cancel any certified public accountant certificate or public accountant registration certificate and any permit to practice public accountancy issued under the laws of this state or may censure the holder of such certificate or permit, * * *." These are the express jurisdictional powers and the only express jurisdictional powers given to the Board, with respect to the licensing of applicants for licenses and certificates to practice Public Accountancy in the first instance in this state. Nowhere in said section or elsewhere in said chapter do we find any express authority for the board to "reinstate" any such license once it has been revoked by the board, absent an order and judgment of the circuit court of the county on review by appeal. As stated, there appears to have been neither an appeal or review from the revocation of Mr. McKee's license in 1938. Therefore, reading and construing said sections 1 and 3 together, we observe that the power to reinstate a revoked license is not expressly named by the statute as a power lodged within the jurisdiction of the Board. That power cannot be assumed or exercised by the Board by implication, for it is not necessary that the Board should have the right to reinstate a license or certificate to practice Public Accountancy in this state in order to perform the named express powers which are given to the Board by section 1.

The Missouri State Board of Accountancy is an administrative body. 46 CJ. 1034, on the powers of administrative bodies, states this text:

> "Rules and orders made by administrative boards must accord with the authority conferred upon the board by law."

Our Supreme Court in the case of State ex rel. Banister, et al. vs. Cantley, Commissioner of Finance, et al., 52 S.W.(2d) 397, construed the powers of administrative officers to be those powers

expressly given by law or implied as being necessary to carry out the powers expressly imposed upon them. The Court, l.c. 398, in so construing such powers, said:

> "The functions of the finance commissioner, like any other official, are limited to the powers and duties imposed upon him by the statute which creates the office. 46 C.J. 1031; State ex rel. Bradshaw v. Hackman, 276 Mo. 600, 208 S.W. 445; Lamar Township v. City of Lamar, 261 Mo. loc. cit. 189, 169 S.W. 12, Ann. Cas. 1916D. 740,
>
> "An official such as the finance commissioner has no implied powers except such as are necessary to the effective discharge of the powers expressly conferred. 46 C.J. 1032."

The Missouri State Board of Accountancy being an administrative board of like status as is the Department of Finance of this state, the construction given of the powers of such boards and commissions by the Court in the Banister case, supra, we believe, is applicable here.

53 C.J.S. 656, commenting on the right of a board to reinstate a license, states the following text:

> "A board or officer has no power to reinstate a license where the statute merely confers the power to revoke. * * *."

The terms of Section 326.130, RSMo 1949, respecting the authority of the Missouri State Board of Accountancy to reinstate a revoked license have not been construed by the Appellate Courts of Missouri. There is, however, an Alabama case cited in support of the text quoted from 53 C.J.S. 656, supra, construing a statute of that state, similar to ours, on the powers of its State Board of Public Accountancy on this precise question. The Supreme Court of Alabama held that the Board had no power to reinstate a revoked license. The case is reported in 123 So. 33, Wright vs. Aldridge, et al., Members of Alabama Board of Public Accountancy. The Court held that the only recourse of the applicant for a certificate was to apply for a new license. That Court, in holding that the Board in that State had no powers other than those conferred by statute, and the right to reinstate a revoked license not being one of the powers conferred, said, at l.c. 34:

> "The statute clearly confers no authority on the board, either expressly or by necessary implication, to reinstate one whose certificate has been canceled for unprofessional conduct,

> or to revive and restore to life a certificate so revoked and canceled; and, if such certificate was restored to the petitioner, it would confer no authority on him to practice as a certified public accountant."

The Alabama case, while, of course, not decisive here, is sound, logical, and persuasive, and, we believe, should be applied here as authority for support of our view, and we so hold that the Missouri State Board of Accountancy has no authority under our statutes to reinstate the revoked license of Mr. Raymond W. McKee, but that Mr. McKee's recourse is to apply for a new license, paying the statutory fee required by law.

CONCLUSION

It is, therefore, the opinion of this Department that, under the provisions of Chapter 326, RSMo 1949, and the authorities herein cited, the Missouri State Board of Accountancy has no power to reinstate the license or certificate of Raymond W. McKee whose license and certificate to practice Public Accountancy in this state was revoked on November 21, 1938.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GWC:ir

COUNTY SOILS DISTRICTS:

1. The Missouri Extension Service or the College of Agriculture does not have the right to pay $25 or any other sum of state or federal money on the cost of a balanced farm plan for "any individual farmer."



2. The supervisors of a county soils district are neither county nor state officials, but are officials of the soils district.

3. Legal action may not be taken against one or more supervisors as individuals so long as they act within the limits of their corporate duties, but each supervisor is liable for wilful or fraudulent breaches of trust or gross negligence.

July 3, 1952

7/11/52

Honorable Ernest W. Baker
Representative, Lafayette County
Higginsville, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion. You thus state your opinion request:

> "Would you please give us an official opinion on the following questions?
>
> "1. Does the Missouri Extension Service or College of Agriculture have the right to pay $25.00 or any other sum of State or Federal money, on the cost of a balanced farm plan for any individual farmer?
>
> "2. Are the supervisors of a County Soil District considered to be State or County officials?
>
> "3. Can legal action be taken against one or more supervisors of a Soil District? If so, under what conditions? To what extent is a supervisor liable?"

We will first consider your first question.

We have made a careful examination of the Federal and State laws pertaining to the matter of your first inquiry.

We are unable to find any authorization for the payment, by the Missouri Extension Service or the College of Agriculture, of any sum of money, either State or Federal, on the cost of a balanced farm plan for "any individual farmer."

We do not attempt to answer the question whether such expenditures, by such agencies, of such moneys, to defray the total cost of what is known as a "balanced farm ring" would or would not be permissible, since you do not ask this question.

Your second question is whether the supervisors of a county soil district are state or county officials.

In this regard we direct your attention to paragraphs 1 and 2 of Section 278.110, RSMo 1949. These paragraphs state:

> "1. The state soil districts commission upon declaring the establishment of a soil district as provided in section 278.100 shall proceed to arrange in the following manner for the establishment of a board of soil district supervisors to act as a local governing body for such soil district. This board shall consist of five members, as follows: Ex officio, the county agricultural extension agent; and four land representatives resident taxpaying citizens within that soil district for a period of two years next preceding such election and elected by the majority vote of land representatives under rules and procedures formulated by the soil commission, but the date of this election shall not fall upon the date of any regular political election held in that county.
>
> "2. The term of office of the ex officio member shall be coincident with his term in the office from which he shall be serving on the supervisory board. The four elected members shall serve for two years, and in case of the death, removal of residence from the county, or resignation from office of any elected member his successor to the unexpired term shall be appointed by the

> state soil districts commission, and such appointee shall be a resident land representative of that county. A soil supervisor may succeed himself by re-election in this office."

From the above it will be noted that the County Agricultural Extension Agent is, by state law, made, ex officio, a member of the Board of Soil Districts Supervisors.

In the case of State ex rel. Hennepin County v. Brandt, 225 Minn. 345, it is held that an "ex officio" member of a board is one who is a member by virtue of his title to a certain office, in this instance, the office of County Agricultural Extension Agent. The other four members of the board are elected by a majority vote of land representatives in the soil district. Section 278.110, paragraph 1, supra, speaks of this board as a "local governing board for such soil district." Paragraph 2 of the above section provides that in case of the death, removal, or resignation of a board member, the state soil districts commission shall appoint a successor to fill the unexpired term. This, however, does not make the appointee a state official. The Governor of the state is given the power to appoint certain officers in counties in case of death, resignation, or forfeiture, but this does not make such appointees state officers. Neither do we believe that the supervisors of a soil district are county officials. Nowhere in the law, relating to soil districts, is there any indication that such supervisors are controlled in any degree by the county or that they have any responsibility to the county. They do not exercise county functions. Nor do they necessarily have county-wide jurisdiction.

There are some instances in Missouri where an entire county is not in a soil district, but in the great majority of counties which have soil districts, the district is composed of one or more townships but not of the entire county. It is difficult to see how one could be a "county official" and yet not have county-wide jurisdiction. We do believe that such supervisors are soil district officials since their responsibilities and jurisdictions are limited to the soil district.

Your third question is: "Can legal action be taken against one or more supervisors of a Soil District? If so, under what conditions? To what extent is a supervisor liable?"

In regard to this, we direct your attention to paragraph 1 of Section 278.120, RSMo 1949, which section states:

> "Any soil district organized under the provisions of this law shall be a body corporate and shall possess only such powers as herein provided, but any such powers possessed by said body corporate shall be particularly limited by the following provisios: provided, that the private property of any land representative or owner of property in such soil district shall be exempt from execution for the debts of the body corporate or soil district and no land representative or owner of property within said soil district shall be liable or responsible for any debts of the body corporate or soil district, and provided further, that no property of any character, title to which is not vested in said soil district, or a soil district as the case may be, shall ever be subject to any lien for any claim or judgment of or against said district, or a soil district, as the case may be. Any soil district so organized shall be officially known and titled 'The Soil District of ..... County,' and shall be so designated by the county court by order of record, and in that name shall be capable of suing and being sued and of contracting and being contracted with."

From the above, it will be noted that a soil district is made a body corporate, and "is capable of suing or being sued." Your question, which relates to the liability of a supervisor in his individual capacity, cannot be given a simple "yes" or "no" answer, since whether a supervisor would be personally liable for an action which he had taken would depend upon the character of the action. Generally, it may be said that corporate officers are not personally liable for their actions as corporate officers so long as they act within the limits of their corporate powers. They are, however, personally liable for wilful or fraudulent breaches of trust, gross negligence, or ultra vires acts.

Honorable Ernest W. Baker

CONCLUSION

It is the opinion of this department that:

1. The Missouri Extension Service or the College of Agriculture does not have the right to pay $25 or any other sum of state or federal money on the cost of a balanced farm plan for "any individual farmer."

2. The supervisors of a county soils district are neither county nor state officials, but are officials of the soils district.

3. Legal action may not be taken against one or more supervisors as individuals so long as they act within the limits of their corporate duties, but each supervisor is personally liable for wilful or fraudulent breaches of trust or gross negligence.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HPWab

COUNTY JUDGES,

BOARD OF EQUALIZATION:

County judges in third class counties are entitled to compensation for services as members of the county board of equalization, in addition to their regular pay as members of the county court, and may be entitled to compensation for both services on the same day.

FILED
4

10/17/52

October 17, 1952

Mr. Charles H. Baker
Assistant Prosecuting Attorney
Dunklin County
Kennett, Missouri

Dear Mr. Baker:

We have given careful consideration to your request for an opinion, which request is as follows:

> "'Are Judges of the County Court in Class Three Counties entitled to the compensation of $5.00 per day for performance of their duties as members of the County Board of Equalization as provided in Sec. 138.020, Revised Statutes of Missouri -1949', and 'May such Judges also be paid their regular compensation as provided in Sec. 49.110, Revised Statutes of Missouri - 1949, in addition to the $5.00 per day as members of the County Board of Equalization, if, on the same day such Judges act in both capacities.'"

The compensation of judges of the county court in counties of the third class is provided in Section 49.110, RSMo 1949, as amended by the 66th General Assembly and published on page 40 of the 1951 Supplement to the RSMo 1949. This section is as follows:

> "In all counties of the third class in this state, the judges of the county court, from and after the expiration of their present terms of office, shall receive for their services the sum of ten dollars per day for each of the first ten days in any month that they are necessarily engaged in holding court and shall receive five dollars per day for each additional day in any month that they may be necessarily engaged in holding court, and shall receive five

> cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court. The per diem compensation herein fixed shall be paid at the end of each month and the mileage compensation shall be paid at the end of each month on presentation of a bill, by each of the respective county judges setting forth the number of miles necessarily traveled; provided, however, that this increase in compensation shall not become effective during any county judge's present term of office."

The county board of equalization is constituted as provided in Section 138.010, RSMo 1949. This section is as follows:

> "1. In every county in this state, except as otherwise provided by law, there shall be a county board of equalization consisting of the judges of the county court, the county assessor, the county surveyor, and the county clerk who shall be secretary of the board without vote.
>
> "2. This board shall meet at the office of the county clerk on the second Monday in July, 1946, and on the second Monday of July of each year thereafter; provided, that in any county having township organization the sheriff of said county shall also be a member of the board of equalization."

The compensation of members of the county board of equalization is provided in Section 138.020, RSMo 1949. This section is as follows:

> "The judges of the county court, the county surveyor, the county assessor, the sheriff, the county clerk, and those sitting as members as may otherwise be provided, shall receive five dollars per day for each day they shall be present and act in the performance of their duties as members of the county board of

Mr. Charles H. Baker:

> equalization; provided, that the above county officers who are now or may hereafter be compensated by salary shall not be entitled to the compensation provided in this section."

It should be observed that the county court and the county board of equalization are two separate and distinct agencies of local government. The judges of the county court are simply designated as ex officio members of the county board of equalization. It so happens that the judges must serve a dual purpose, but the duties and functions of the board do not lie within the province of the court.

Under Section 49.110 the judges of the county court are entitled to compensation for all days "that they are necessarily engaged in holding court," and under Section 138.020 they "shall receive five dollars per day for each day they shall be present and act in the performance of their duties as members of the county board of equalization." It may be expedient or necessary for the judges to hold a meeting of the court on a day in which the board of equalization is in session. There seems to be nothing in the law to prohibit a meeting of the county court at such time. In that event the judges would be entitled to pay for both services on the same day.

CONCLUSION

It is the opinion of this office that the judges of the county court in counties of the third class are entitled to the compensation of five dollars per day for performance of their duties as members of the county board of equalization, in addition to their regular pay as members of the county court, and may be entitled to compensation for both services when acting in both capacities on the same day.

Respectfully submitted,

APPROVED:

B. A. TAYLOR
Assistant Attorney General

J. E. TAYLOR
Attorney General

BAT:irk

TAXATION:
REFUND:

The director of revenue is not authorized to make tax refunds on claims filed prior to the effective date of House Bill No. 196.

FILED
5

June 16, 1952

7-3-52

Honorable G. H. Bates
Director of Revenue
Department of Revenue
Capitol Building
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department. Your request reads in part as follows:

> "1. Is this Department authorized to make refund on claims filed prior to the effective date of the Act?
>
> "2. If claimant has written a letter requesting refund, may we consider the date of his letter as the time refund was claimed and permit him to complete said claim by filing one in writing under oath, as required in paragraph 3 of said Act?

House Bill No. 196 as enacted by the 66th General Assembly referred to in your opinion request and under which the proposed refund could be made reads as follows:

> "Section 1. 1. The director of revenue from funds appropriated, shall refund any overpayment or erroneous payment of any tax which the state is authorized to collect. The general assembly shall appropriate and set aside funds sufficient for the use of the director or revenue to make refunds authorized by this section or by final judgment of court.

> "2. The director of revenue shall refund any overpayment or erroneous payment of any tax on intangible personal property and the amount refunded shall be charged against the next apportionment to the political subdivision which was the residence or situs of the taxpayer at the time the tax was paid.
>
> "3. No refund shall be made by the director of revenue unless a claim for refund has been filed with him within two years from the date of payment. Every claim must be in writing under oath and must state the specific grounds upon which the claim is founded."

You stated in your opinion request that House Bill No. 196 would become effective April 22, 1952, however, we wish to point out that House Bill No. 196 became effective October 9, 1951.

We would here note that House Bill No. 196 refers to the overpayment or erroneous payment of a tax without regard to whether the payment was voluntary or involuntary. It is generally stated by the appellate courts of this state that the refund of taxes illegally collected (by voluntary payment), is a matter of governmental grace and in the absence of statutory provision(s), the taxpayer is not entitled to refund. In the case of State ex rel. S. S. Kresge Co. v. Howard, 208 S.W. (2d) 247, the Supreme Court of Missouri stated the following rule as follows:

> "* * *The refund of taxes illegally exacted is ordinarily a matter of governmental grace. On grounds of public policy, the law discourages suits for the refund of taxes illegally levied and collected, and has imposed many restrictions on their recovery. It is generally held that taxes voluntarily paid without compulsion, although levied under an unconstitutional statute, cannot be refunded without the aid of a statutory remedy. 51 Am. Jur. Taxation Sec. 1167."

Under such a holding it is obvious that a taxpayer has no legal claim to refund as contemplated and governed by House Bill No. 196 of a voluntary overpayment or erroneous payment of a tax. Clearly the purpose of such a law is to provide a statutory remedy where none existed in the case of voluntary payments and a simpler

and more expedient remedy in the case of an involuntary payment. Therefore, since said bill would seem to embrace voluntary as well as involuntary payments, and we so conclude, we are of the opinion that the term "claim" as used refers to a claim which is therein created.

It is a familiar rule of statutory construction that statutes should be given a reasonable and logical construction, if such can be done, In re: H- S-., 165 S.W. (2d) 300. It would be unreasonable to assume that the legislature intended the director of revenue to pay legal claims which existed prior to the effective date of House Bill No. 196 and to preclude (by not mentioning) those for which no claim existed when if said "claim" is filed after the effective date he should pay both. We believe that the term claim as used means a claim which the director of revenue would be bound to pay under House Bill No. 196 if filed in the time and form therein prescribed. Consequently, no such claim would exist or accrue to the taxpayer prior to October 9, 1951, and there could be no such claim on file with the director of revenue prior to such date.

Further, we are of the opinion that if the claim is one created by House Bill No. 196 the director of revenue would have no authority to accept for filing any claims prior to the effective date of the law. Therefore, the acceptance of a request for refund submitted by the taxpayer and received by the director of revenue prior to October 9, 1951, would not constitute a claim as created by House Bill No. 196 and would be meaningless and inoperative insofar as this bill is concerned.

Having answered your first question in the negative, it is not now necessary to consider question No. 2.

CONCLUSION

Therefore, it is the opinion of this department that a claim for refund of an overpayment or erroneous payment of a tax which could be refunded by the director of revenue under House Bill No. 196 is created and exists under and by virtue of said bill and since no such claim could be filed prior to the effective date of said bill, there could exist no claims prior to such date on which the director of revenue could make refunds.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

BB

J. E. TAYLOR
Attorney General

COUNTY COURTS: A county court may change its county judicial
COUNTY COURT districts by formal court order.
DISTRICTS:

FILED
5

June 19, 1952 6-19-52

Honorable Charles V. Barker
Prosecuting Attorney
Polk County
Bolivar, Missouri

Dear Sir:

We are in receipt of your opinion request which is as follows:

> "In view of the fact that the population has shifted considerably in Polk County in recent years, the two districts from which the associate judges of the County Court are elected are very unequal in population, and the County Court purposes to redistrict the county so as to have a more fair representation on the court.
>
> "The judges of this county brought the question up at the convention of county judges in Jefferson City, and no one there apparently knew what to do concerning the matter.
>
> "The only authority I find on the question is Section 47.010 and Section 49.010 in the Revised Statutes of 1949, and I cannot find where the latter section has been construed regarding this question. I would therefore like to have your opinion on the following question:
>
> "'Does the County Court have the authority to redistrict the county as occasion requires? If not, who does have that authority? Also, please state what procedure should be taken in redistricting.'"

We agree with you in your letter when you state that Section 47.010 and Section 49.010, RSMo 1949, are the sections of the statute in regard to your question. We believe that both of these sections apply - Section 47.010 in regard to the division of the county into townships and Section 49.010 in regard to determining the districts of the county court. Since these two seem to be the only reference that the statutes of our state make to this kind of an arrangement for county government, it is evident that the county government should be organized in accordance with them. We are purposely omitting the new forms of county reorganization for counties of other classes. It is naturally of importance in the matter of redistricting a county for county judgeships to consider first the method of dividing townships, that the county court districts follow the statute, and be, in the words of the statute, "two districts, of contiguous territory, as near equal in population as practicable, without dividing municipal townships." The above reference is to Section 49.010, RSMo 1949.

In regard to statutory construction of Section 47.010, supra, in the division of a county into townships by the county court, our Supreme Court held in regard to a previous similar statute in State ex inf. McKittrick v. Tegethoff, 338 Mo. 328, l.c. 330, 331, as follows:

> "* * * Section 12041, Revised Statutes 1929, is as follows:
>
> "'Each county court may divide the county into convenient townships, and as occasion may require erect new townships, subdivide townships already established, organize better township lines, and may, upon the petition in writing of not less than twenty-five per centum of the legally qualified voters of each township affected, as such vote was cast in the last preceding general election for the office receiving the greatest number of votes in the township or townships affected, consolidate two or more existing townships, into one township, or otherwise reduce the number of townships, or change the boundary lines thereof, as may be deemed advisable.'"

At l.c. 331, 332, the Court interpreted the statute, as follows:

> "1. Construing the section by its language and history we think it clear the first part thereof deals with: the original division of a county into townships after its organization; the subsequent erection of new townships, and the subdivision of townships, thereby increasing the number of townships; and the changing of boundary lines whether the number of townships be increased or remain the same. The statute has never required a written petition for this during the entire history of the State. The latter part of the section, which used to call for a petition signed by at least fifty residents of the townships affected and now requires the signature of twenty-five per cent of the qualified voters, etc., contemplates a reduction in the number of townships by consolidation or otherwise. That is what the title of the act said when this part of the section was added by amendment in 1909."

Other incidences of constructing this statute and in regard to the authority of the county court in such matters are found in State ex rel. Sears v. Hall, 28 S.W. (2d) 1026, State v. Dawson, 225 S.W. 97, and Houck v. Little River Drainage District, 154 S.W. 739.

Section 49.010, RSMo 1949, is quoted at length for the purpose of this opinion and is as follows:

> "The county court shall be composed of three members, to be styled judges of the county court, and each county shall be districted by the county court thereof into two districts, of contiguous territory, as near equal in population as practicable, without dividing municipal townships."

We have found few cases in which this section or the method of county organization as described in this section has come to the attention of the court. However, in an early case of State ex rel. Attorney General, relator, v. Gilbreath, the Supreme Court of Missouri had before it the following provisions of the General Statutes of 1865 (Wagner Statutes, 439) which we quote from 48 Mo., l.c. 110:

> "The question is thus raised whether the action of the County Court in districting the county had any such effect as is claimed by respondent. The section of the statute referred to is as follows:
>
> "'Section 1. The County Court shall be composed of three members, to be styled "the justices of the County Court," and each county, where the court is composed of three justices, may be districted by the County Court, if they think the good of the county will be promoted thereby, into three districts, as near equal in population as practicable without dividing municipal townships; and each district shall elect and be entitled to one of the justices of the County Court.'"

This case did not involve the means of redistricting the county court or the method of doing it. However, the Statutes of 1865 was similar in its direction to the county court in Section 49.010, supra. The county court in the Gilbreath case had been reorganized. It was presumably organized under the directions of the Statutes of 1865 and the method of reorganization was not attacked. The Court discussed the reorganization without disapproval. The question before the Court was concisely this: When the county court redistricted the county into judicial districts, did it result in all three county judgeships being vacant? The Court determined that it did not. It simply held at l.c. 112, as follows:

> "* * * Under this construction the present justices will hold their statutory term, an election of one justice will be had every two years, and each district will elect one, thus affirming the material provisions of the statute. It is objected that two of the districts are deprived of their right to elect. True, until the terms of the justices already elected shall expire. No statute providing for a future election to any office already filled can take effect until the termination of the pending term, unless the term is expressly cut off. That is not the real difficulty

> in this case, but it is in the assignment of the justices, thus determining in which district the first district election should be had. But such assignment being necessary to carry into effect the power to district, the power to make it should be implied from the one expressly granted. * * *"

We have found no other guiding light of judicial construction of the statutes to direct us in the reorganization of a county. It has been accomplished many times among the 114 counties of Missouri and has seldom reached the judicial scrutiny of our appellate courts. Section 49.170, RSMo 1949, provides for terms of the county court. It is, in part, as follows:

> "Four terms of the county court shall be held in each county annually, at the place of holding courts therein, commencing on the first Mondays in February, May, August and November. The county courts may alter the times for holding their stated terms, giving notice thereof in such manner as to them shall seem expedient; * * *"

Absent further statutory direction, it appears that in the event the county court at a regular term meeting determines and makes a formal order which redistricts the county in accordance with Section 49.010, supra, the redistricting would be legal and proper.

CONCLUSION

Therefore, it is the opinion of this department that a county court may change its county judicial districts by a formal order of the county court at any of its regular term meetings.

Respectfully submitted,

JAMES W. FARIS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JWFab

TAXATION:
MOTOR FUEL:

Four questions relating to House Bill No. 180 pertaining to a tax on motor fuel.

July 16, 1952 7-23-52

FILED
5

Honorable G. H. Bates
Director of Revenue
Capitol Building
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department. Your request reads as follows:

> "As I am charged with the collection of the tax imposed by House Committee Substitute for House Bill No. 180 enacted by the 66th General Assembly, I wish to submit for your opinion the following questions:
>
> "1. Is the tax imposed by said House Bill No. 180 a sales tax or a use tax within the meaning of Art. III, Sec. 39 (10), of the Missouri Constitution of 1945, or is it a business, license or occupation tax, or is it a tax for the privilege of using the highways?
>
> "2. Is the United States Government, its agencies and instrumentalities, exempt from the payment of the tax imposed by said bill?
>
> "3. Is the tax applicable to motor fuel imported into the State of Missouri by the Federal Government itself?
>
> "4. Am I correct in assuming that said House Bill No. 180 will be effective at 12:01 a.m. on July 29, 1952?
>
> "I would appreciate an early reply in order that I may advise the distributors and dealers

who, under the law are required to collect the tax, whether the tax is applicable to sales to the Federal Government, its agencies or instrumentalities."

The first question deals with Art. III, Section 39(10), Constitution of Missouri 1945 in regard to whether or not the tax imposed by House Bill No. 180 falls within the prohibition therein contained. In answer to this question we are enclosing a copy of an opinion to Mr. George Metzer, State Inspector of Oils, July 6, 1945. This opinion states that the majority of cases hold that said tax is either a compensation tax for the privilege of using the public highways or a license tax on the distributor measured by the sales of gasoline and that under either classification said tax would not fall within the prohibition contained in Article III, Section 39(10), Constitution 1945.

You next inquire as to whether the United States Government, its agencies and instrumentalities are exempt from the payment of the tax. It is noted that the law as contained in Chapter 142, RSMo 1949, and prior to amendment by House Bill No. 180, exempts from taxation "motor fuel sold to the United States of America or any agency or instrumentality thereof" and "motor fuel sold to any post exchange or concessionaire or any federal reservation within this state." House Bill No. 180 does not contain these exemptions, however, we do not believe that by reason thereof the state may now tax the United States Government, its agencies or instrumentalities.

The sovereignty of a state extends to everything which exists by its own authority but it does not extend to those means which are employed by congress to carry into execution the powers conferred upon that body by the Constitution of the United States. It is well settled that a state has no power to tax the means which the federal government employs to carry on its proper functions. 26 R.C.L., Section 71, page 95.

This principle has been given a wide application and particularly to statutes like the one questioned. In the case of Panhandle Oil Co. v. Mississippi, 147 Miss. 663, the Supreme Court of Mississippi had before it a question similar to the one which you have proposed. The State of Mississippi had provided that any person engaged in the business of distributing gasoline, retail dealers in gasoline, shall pay for the privilege of engaging in such business a tax of one cent (1¢) per gallon upon the sale of gasoline. A distributor had sold gasoline to certain agencies of the United States and the state sought to collect said tax. The Supreme Court held that the tax was imposed upon the distributor and it was not a direct tax against the instrumentality of the federal government and therefore the state was entitled to recover. The case was then appealed to the United States

Supreme Court and the holding of the Mississippi Supreme Court was reversed in an opinion by Mr. Justice Butler. In its opinion the court said:

> "* * *The states may not burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax means used for the performance of Federal functions. * * *While Mississippi may impose charges upon petitioner for the privilege of carrying on trade that is subject to the power of the state, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes.
>
> "The validity of the taxes claimed is to be determined by the practical effect of enforcement in respect of sales of the government. Wagner v. Covington, 251 U.S. 95, 102, 64 L. ed. 157, 167, 40 Sup. Ct. Rep. 93. A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the state. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. The amount of money claimed by the state rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons. The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion of the United States, of its constitutional powers to operate the fleet and hospital.
>
> * * * * * * * * * * * * * *
>
> "The exactions demanded from petitioner infringe its right to have the constitutional independence of the United States in respect of such purchases remain untrammeled. Osborn v. Bank of United States, 9 Wheat, 738, 867, 6 L.ed. 204, 234; Western U. Teleg. Co. v. Texas, supra. Cf. Terrace v. Thompson, 263 U.S. 197, 216, 68 L. ed. 255, 274, 44 Sup. Ct. Rep. 15. Petitioner is not liable for the taxes claimed."

We believe that the above case is clear-cut and controlling on the question at hand and that the state cannot, under the authority of House Bill No. 180 exact a tax from a distributor on sale by such

distributor to the United States Government, its agencies or instrumentalities.

We are further of the opinion that the United States Government, its agencies or instrumentalities located within this State cannot be taxed as a distributor as defined in Section 142.010, RSMo 1949, since, as previously stated, the State has no authority to tax the instrumentality which the federal government employs to carry on its proper functions.

In regard to the effective date of this law, Section 1.130, RSMo 1949, is as follows:

> "A law passed by the general assembly shall take effect ninety days after the adjournment of the session at which it is enacted; provided, however, if the general assembly recesses for thirty days or more, it may prescribe by joint resolution that laws previously passed and not effective shall take effect ninety days from the beginning of the recess, subject to the following exceptions:
>
> "(1) A law necessary for the immediate preservation of the public peace, health or safety, which emergency must be expressed in the body or preamble of the act and which is declared to be thus necessary by the general assembly, by a vote of two-thirds of its members elected to each house, said vote to be taken by yeas and nays, and entered on the journal or a law making an appropriation for the current expenses of the state government, for the maintenance of the state institutions or for the support of public schools, shall take effect as of the hour and minute of its approval by the governor; which hour and minute may be endorsed by the governor on the bill at the time of its approval;
>
> "(2) In case the general assembly, as to a law not of the character herein specified, shall provide that such law shall take effect on a date in the future subsequent to the expiration of the period of ninety days herein mentioned, said law shall take effect on the date thus fixed by the general assembly;
>
> "(3) In the case the general assembly shall provide that any law shall take effect as provided in subsection (1) of this section, the general assembly may provide in such law that the operative date of the law or parts of the law shall take effect on a date subsequent to the effective date of the law."

Honorable G. H. Bates

As to the application of House Bill No. 180, no effective date has been stated in the bill. Under the statute cited above it must go into effect July 29, 1952, that date being ninety days after the adjournment of the session in which it was enacted.

CONCLUSION

Therefore, it is the opinion of this department that:

(1) House Bill No. 180, amending Chapter 142, RSMo 1949, does not fall within the prohibition contained in Article III, Section 39(10), Constitution of Missouri 1945.

(2) That the State of Missouri may not exact a tax such as is contained in House Bill No. 180 on sales of gasoline to the United States Government, its agencies and instrumentalities.

(3) That the State of Missouri has no authority to impose a tax upon the federal government for motor fuel imported into the State of Missouri by the federal government.

(4) That House Bill No. 180 will become effective on July 29, 1952, such date being ninety days after the adjournment of the 66th General Assembly by which it was enacted.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DDG:hr

GAMBLING EQUIPMENT: The selling, storing, possession, and transportation in interstate commerce of any punchboard, slot machine, lottery ticket, roulette wheel, policy slip, book, list of numbers, or any article incident to a lottery or other gambling devices, is not prohibited by any law of the State of Missouri.

FILED
#5

August 14, 1952

8-15-52

Honorable Harold B. Bamburg, Acting
Prosecuting Attorney
Pettis County
Sedalia, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

> "There is a concern in Pettis County that is engaged in the manufacture of a gambling device or article. The sales of this product are all made to customers outside the State of Missouri. In connection with the manufacture, the concern also sells, stores, possesses and transports these articles, but only in connection with the manufacturing for sale to their out-state customers. I would like to know if the new gambling law recently passed by the General Assembly, which was formerly Senate Bill No. 226, prohibits the activities of the concern in question.
>
> "I would like an expression of opinion from your office on the construction of the phrase found in Section 1 of the Bill 'except in interstate commerce' so that I will know whether the exception refers only to the word transport or whether it also refers to the words sell, store and possess."

The law to which you refer is Senate Committee Substitute for Senate Bill No. 226, as truly agreed to and finally passed by the 66th General Assembly of Missouri. Section 1 reads as follows:

> "Every person who shall sell, store, possess or transport except in interstate commerce any punchboard, slot machine, lottery ticket, roulette wheel, policy slip, book, list of numbers or any other evidence of transactions incident to a lottery, or any other gambling device, equipment or article, shall be deemed guilty of a misdemeanor. All such equipment, devices and articles are hereby declared contraband and may be seized by any peace officer to be disposed of as herein provided."

It will be noted that the prohibition contained in the bill is against every person who shall sell, store, possess or transport except in interstate commerce any gambling devices, equipment or article. From the structure of the sentence, it would appear to be plain that this bill does not prohibit the possession or transportation of gambling devices in interstate commerce. Can it be said that the exception also refers back to the storing of gambling equipment? It seems to us to be clear that it does, inasmuch as any such gambling equipment would necessarily be considered to be stored so long as it was actually in process of transportation, and that the only means by which this type of storage could be avoided would be for such gambling equipment to be on a carrier being transported from another state across the State of Missouri. Clearly, this was not the object of the bill.

In the case of Local 167 v. United States, 291 U.S. 293, the Court said, l.c. 293:

> "2. Control of the handling, sales and prices at the place of origin before the interstate journey begins, or in the State of destination where the interstate movement ends, may operate directly to restrain and monopolize interstate commerce."

In the case of United States v. Sheffield Farms, 43 Fed. Sup.1, the Court stated, l.c. 5:

> "(7,8) The temporary stoppage of commerce on its way to the ultimate consumer does not remove the flow from the jurisdiction of the Federal Government. * * * Therefore the stoppage of the milk, coming across state lines, for the purposes of pasteurization and packaging or bottling, did not change its interstate character. * * *"

Honorable Harold B. Bamburg

It seems equally clear to us that the selling of gambling equipment in interstate commerce is likewise included in the exception. We believe, therefore, that a person in Missouri who sells, stores, possesses and transports gambling devices solely in interstate commerce, does not come within the prohibition of Senate Bill No. 226.

CONCLUSION

It is therefore the opinion of this department that the selling, storing, possession and transportation in interstate commerce of any punchboard, slot machine, lottery ticket, roulette wheel, policy slip, book, list of numbers, or any article incident to a lottery or other gambling device, is not prohibited by any law of the State of Missouri.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HPWab

SALES TAX:
USE TAX:
MOTOR VEHICLES: The owner of a new or used motor vehicle in Missouri, who is not exempt from the payment of a sales tax or a use tax, is not entitled to retain three per cent of such sales tax or use tax.

FILED
5

September 22, 1952

9/23/52

Honorable G. H. Bates
Director of Revenue
Capitol Building
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion. You thus state your opinion request:

> "Section 144.140 of the Sales Tax Act permits the seller to retain three percent of the tax. It has been the ruling of our Department that the merchant engaged in business is entitled to three per cent for collecting and remitting the tax to the Department of Revenue.
>
> "Section 144.440 requires the purchaser of a motor vehicle to pay the sales tax direct to the Department of Revenue before the certificate of title to said vehicle shall be issued.
>
> "The question has been raised as to whether or not the purchaser of the car would be entitled to the three per cent deduction provided for in Section 144.140 when remitting the sales tax on his motor vehicle.
>
> "Our Department has held that the purchaser of the car is not the seller or dealer within the meaning of the law and has, therefore, refused to allow this deduction.
>
> "We have recently been asked to secure from your department an opinion as to

whether or not our interpretation of these sections is correct."

In regard to your inquiry we would first direct your attention to Section 144.070, RSMo 1949, which section reads:

"1. That at the time the owner of any new or used motor vehicle which was acquired in a transaction subject to sales tax under the Missouri sales tax law makes application to the director of revenue for an official certificate of title and the registration of said automobile as otherwise provided by law, he shall present to the director of revenue evidence satisfactory to said director of revenue showing the purchase price paid by or charged to the applicant in the acquisition of said motor vehicle, or that no sales tax was incurred in its acquisition, and if sales tax was incurred in such acquisition, such applicant shall pay or cause to be paid to the director of revenue the sales tax provided by the Missouri sales tax law in addition to the registration fees now or hereafter required according to law, and the director of revenue shall not issue a certificate of title for any new or used motor vehicle subject to sales tax as provided in said Missouri sales tax law until the tax levied for the sale of the same under this chapter has been paid as herein provided.

"2. As used above, the term purchase price shall mean the total amount of the contract price agreed upon between the seller and the applicant in the acquisition of said motor vehicle, regardless of the medium of payment therefor.

"3. In the event that the purchase price is unknown or undisclosed, or that the evidence thereof is not satisfactory to the director of revenue, the same shall be fixed by appraisement by the director.

> "4. The director of revenue shall endorse upon the official certificate of title issued by him upon such application an entry showing that such sales tax has been paid or that the vehicle represented by said certificate is exempt from sales tax and state the ground for such exemption."

We would next invite your attention to Section 144.080, RSMo 1949, which section reads:

> "1. Every person receiving any payment or consideration upon the sale of property or rendering of service subject to the tax imposed by the provisions of this chapter, or required to make collection of the tax imposed by the provisions of this chapter, shall be responsible not only for the collection of the amount of the tax imposed on said sale or service, but shall, on or before the fifteenth day of the month following each calendar quarterly period of three months, make a return to the director of revenue of all taxes collected for the preceding quarter, or required to be collected for the preceding quarter, and shall remit the taxes so collected or required to be collected to the director of revenue.
>
> "2. The seller of any property or person rendering any service, subject to the tax imposed by this chapter, is directed to collect the tax from the purchaser of such property or the recipient of the service as the case may be.
>
> "3. The tax imposed by this chapter is a tax upon the sale, service or transaction and shall be collected by the person making the sale or rendering the service at the time of making or rendering such sale, service or transaction, provided, however, that the collection of the tax imposed by this chapter on motor vehicles shall be made as provided for in section 144.070.

> "4. It shall be unlawful for any person to advertise or hold out or state to the public or to any customer directly or indirectly, that the tax or any part thereof imposed by this chapter, and required to be collected by him, will be assumed or absorbed by the person, or that it will not be added to the selling price of the property sold or service rendered, or if added, that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor."
> (Underscoring, ours.)

From the above two sections it is clear that when the owner of a new or used motor vehicle which was acquired in a transaction subject to the Missouri sales tax law, applies to the Director of Revenue for a certificate of title and registration of said motor vehicle, he shall pay or cause to be paid to the Director of Revenue the sales tax due upon such motor vehicle.

A reading of Section 144.080, supra, also shows that this method of paying the sales tax on motor vehicles is an exception to the general practice, which in all other instances except that of motor vehicles, requires the seller to collect the sales tax from the purchaser at the time of sale, and at stated times to remit said sales tax to the Director of Revenue.

In your letter to us, you refer to Section 144.440, RSMo 1949, as a "sales tax." We do not believe this section to be a sales tax, but, as its title states, a "use tax."

That section, in the Missouri Revised Statutes of 1949, reads:

> "Use tax on motor vehicles--duty of purchaser and director.-- 1. In addition to all other taxes now or hereafter levied and imposed upon every person for the privilege of using the highways of this state, there is hereby levied and imposed a tax equivalent to two per cent of the purchase price, as defined in section 144.070, which is paid or charged on new and used motor

vehicles purchased or acquired for use on the highways of this state which are required to be registered under the laws of the state of Missouri.

"2. That at the time the owner of any such motor vehicle makes application to the director of revenue for an official certificate of title and the registration of the same as otherwise provided by law, he shall present to the director of revenue, evidence satisfactory to said director showing the purchase price paid by or charged to the applicant in the acquisition of said motor vehicle, or that said motor vehicle is not subject to the tax herein provided and, if said motor vehicle is subject to the tax herein provided, such applicant shall pay or cause to be paid to the director of revenue the tax provided herein.

"3. In the event that the purchase price is unknown or undisclosed or that the evidence thereof is not satisfactory to the director of revenue, the same shall be fixed by appraisement by the director.

"4. No certificate of title shall be issued for such motor vehicle unless said tax for the privilege of using the highways of this state has been paid."

Section 144.450, Missouri Revised Statutes 1949, as amended by House Bill No. 119, reads as follows:

"Exemptions from use tax

"In order to avoid double taxation under the provisions of this act, any person who purchases a motor vehicle in any other state and seeks to register it in this state shall be credited with the amount of any sales tax or use tax shown to have been previously paid by him on the purchase

> price of such motor vehicle in such other state. The tax imposed by section 144.440 shall not apply to motor vehicles on account of which the sales tax provided by this act shall have been paid, nor to motor vehicles brought into this state by a person moving any such vehicle into Missouri from another state who shall have registered and in good faith regularly operated said motor vehicle in said other state at least ninety days prior to the time it is registered in this state, nor to motor vehicles acquired by registered dealers for resale, nor to motor vehicles purchased, owned or used by any religious, charitable or eleemosynary institution for use in the conduct of regular religious, charitable or eleemosynary functions and activities, nor to motor vehicles owned and used by religious organizations in transferring pupils to and from schools supported by such organization, nor where the motor vehicle has been acquired by the applicant for a certificate of title therefor by gift or under a will or by inheritance, and the tax hereby imposed has been paid by the donor or decedent, nor to any motor vehicle owned or used by the state of Missouri or any other political subdivision thereof, nor by an educational institution supported by public funds, nor to farm tractors."

From Section 144.450, supra, as amended, it is clear that the owner of a motor vehicle who has followed the procedure outlined in Sections 144.070 and 144.080, supra, is not subject to Section 144.440, supra. If the owner of a motor vehicle has not paid the sales tax he is subject to Section 144.440, supra, at the time he applies to the Director of Revenue for a certificate of title and registration, unless exempt by virtue of Section 144.450, supra. In either event, the question which we have to answer is whether, when the owner of a motor vehicle applies to the Director of Revenue for a certificate of title and registration, is he entitled to the benefit of Section 144.140, RSMo 1949, which section reads:

> "From every remittance to the director of revenue made on or before the date when the same becomes due, the person required to remit the same shall be entitled to deduct and retain an amount equal to three per cent thereof."

It is the opinion of this department that the purchaser is not entitled to retain the three per cent provided by the above section, whether his payment to the Director of Revenue be the sales tax which he is directed to pay by Section 144.070, supra, or the use tax set forth by Section 144.440, supra. We do believe that Section 144.140, supra, applies only to those persons who sell goods subject to a sales tax in those instances where the seller is charged with the collection of the sales tax from the purchaser which, as we pointed out, is not true of purchasers of motor vehicles according to Sections144.070, 144.080 and 144.440, supra. We believe that the six sections, beginning with Section 144.080, which precedes Section 144.140, clearly show this to be the fact and the intention of the Legislature, as all of these sections are clearly intended to apply to those cases in which the seller is required to collect the sales tax from the purchaser at the time of sale, except the provision, noted above, in Section 144.080, which applies solely to motor vehicles.

There is, furthermore, a good and apparent reason why Section 144.140 should apply only to a seller who is charged with the collection of a sales tax from the purchaser. The collection of a sales tax by the seller from the purchaser upon every item sold, however large or small, and the refunding of that tax by the seller to the Department of Revenue, at fixed intervals, imposes an onerous burden upon the seller. It involves the handling of extra amounts of money in which the seller has no personal interest. It involves additional bookkeeping, and easily could, if the volume of sales were great enough, require the employment of additional clerical help. We assume that the Legislature enacted Section 144.140, supra, with the intent to compensate the seller for being, in effect, a tax collector for the state. Such compensation would appear to be wholly just and reasonable. But the same line of reasoning does not apply to the purchaser of a motor vehicle who is required to pay his sales tax, or use tax, as the case may be, directly to the Director of Revenue. No burden of tax collection is placed upon him and there is no apparent reason why he should be allowed to retain the three per cent provided for by Section 144.140, supra.

Honorable G. H. Bates

CONCLUSION

It is the opinion of this department that the owner of a new or used motor vehicle in Missouri, who is not exempt from the payment of a sales tax or a use tax, is not entitled to retain three per cent of such sales tax or use tax.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HPWab

Mimeographed

COUNTY ASSESSOR: Township assessor not required to perform duties
COMPENSATION: of House Bill No. 392 passed by the 66th General Assembly. County shall pay additional compensation to county assessor provided for in Section 150.335 of said bill.

December 4, 1952

12/5/52

FILED
5

Honorable G. H. Bates
Director of Revenue
State of Missouri
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request which reads:

> "On June 7, 1952 this department made the following request for an official opinion from your office:
>
> "'It is noted from an opinion issued by your department under date of May 26, 1952 that assessors are entitled to an additional fee of 45¢ for visiting and inspecting the establishments of merchants and manufacturers and 6¢ for making a report.
>
> "This department would like to know if one-half of this additional fee is to be paid by the State and one-half by the county. We would like, also, to know if this fee statute applies to township assessors in counties under township organization.'
>
> "We would like very much to have this opinion at your earliest convenience."

It does seem rather unusual that the Legislature in enacting House Bill No. 392 would require county assessors in counties of the third and fourth class to investigate merchants and businesses in their respective counties and make a report thereon, and at the same time not include in said bill the same duty for

township assessors in said counties; for the reason in counties under township organization there is no county assessor, but only the township assessors who perform all the duties ordinarily required of a county assessor. A careful examination of said House Bill No. 392 fails to disclose wherein there is any ambiguity in said bill with regard to this particular request.

Section 150.055 of said bill merely provides that the county assessor at least once a year shall visit and inspect each place, warehouse, store or other establishment owned and operated by any merchant in his county, for the purpose of attaining certain information necessary for comparative purposes with the statement made by such establishments under Section 150.050, RSMo 1949. As can be seen, Section 150.055, supra, specifically places the additional duty only on the county assessor.

Section 150.060 of said bill merely requires the assessor or county clerk, as the case may be, to read the merchant's tax book and further provides that the assessor shall make the reports required under Section 150.155, which section only provides for the county assessor to make such reports.

Furthermore, Section 150.325 of said bill refers solely to the county assessor, who, under said statute, is required to make a similar visit and report as provided under Section 150.055 of said bill. Only this section applies to certain other businesses and manufacturers.

So, in view of the foregoing statutes, we must conclude that if the Legislature desires township assessors of third and fourth class counties to perform the additional duties clearly placed upon county assessors in said counties under said bill, then it must be more specific and will necessitate an amendment to said bill so as to include township assessors. In the absence of such an amendment, we must hold that the provisions of House Bill No. 392 are not applicable to township assessors in third and fourth class counties.

You also inquire if township assessors are entitled to the additional compensations provided in Section 150.335 of said bill. Since we have already held the bill does not apply to township assessors in these particular counties, we hardly deem it necessary to further discuss this question. However, Section 150.335, supra, the only provisions said bill contains relating to additional compensation for such duties merely provides that the county assessor in all such counties shall receive a certain specified fee. There is absolutely no mention of any additional fee to the township assessor for any such duties performed by him. Therefore, under Nodaway County v. Kidder, 129 S.W. (2d)

857, 344 Mo. 795, the Court laid down the rule that a public officer claiming compensation for official duties performed, must point out the statute authorizing such payment. In view of this, even if the township assessor of this bill should be required to perform the duties provided therein, which he is not required to do, he would be entitled to no additional compensation for such services for the reason that there is no statute authorizing the additional compensation for anyone, except the county assessor.

You further inquire if the state and county shall share the payment of these fees provided for the county assessor under Section 150.335, supra.

House Bill No. 392 is silent as to how such additional compensation shall be paid the county assessor, but while it is true that under Sections 53.130-140, RSMo 1949, the Legislature fixed the compensations of county assessors in third and fourth class counties and provided that the state and county should share the cost of such compensation. However, there is no such statute authorizing the state to pay one-half of this additional compensation provided for in Section 150.335, House Bill No. 392. Under Section 50.330, RSMo 1949, it provides that any salary provided for a county officer shall be paid in monthly installments by warrants drawn on the county treasury. Under Ward v. Christian County, 111 S.W. (2d) 182, l.c. 184, the Supreme Court said:

> " * * * However, section 11781, R.S. 1929, Mo. St. Ann. § 11781, p. 6996, allows fees for many services not performed for third persons. Necessarily these are chargeable to the county and should be paid by the county to the clerk (or his deputy) up to the amounts allowed by section 11811 for the compensation of the clerk and his deputies. * * * "

Therefore, we must hold that the additional compensation provided in House Bill No. 392 must be paid by the county.

CONCLUSION

It is the opinion of this department that township assessors in third and fourth class counties are not required

Honorable G. H. Bates

under House Bill No. 392 passed by the 66th General Assembly to make the annual visitation and report provided for therein, and it naturally follows that such township assessor is not entitled to any additional compensation or fee for such service rendered as provided for in Section 150.335 of said bill.

Furthermore, the additional compensation provided for the county assessor in Section 150.335 of said bill must be borne by the county in the absence of a statute to the contrary.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARH:lw

STOCK LAW: Township adjoining group of five townships which has previously voted to invoke stock law may thereafter vote to withdraw operation of stock law.
ANIMALS:

May 16, 1952

5-21-52

FILED
6

Honorable John W. Belew
Prosecuting Attorney
Ripley County
Doniphan, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this department, which reads as follows:

> "My county is a rural county in which there is much concern over the stock law. One of our townships last year voted to restrain livestock from running at large. This year some of the people in the township want to hold an election to revoke this action.
>
> "Section 270.160, Rev. Statutes of Missouri, 1949, gives the privilege of holding an election to restrain livestock. In the latter part of the section is the proviso: 'provided, however, that nothing in this section shall be construed to prevent the petitioning for and holding of an election to permit animals to run at large in townships that have voted to restrain said animals from running at large. But I have been unable to find any implementing legislation as to the procedure.
>
> "What I would like to know boils down to this: May an election be held permitting animals to run at large in a township after an election has prohibited their running at large? If such an election is possible, what is the procedure for holding that election?"

Honorable John W. Below

Pursuant to our further inquiry you stated that the township which would vote out the stock law is one which adjoins a group of five townships which have previously voted to invoke the provisions of the stock law. Thus the applicable statute which pertains to this situation is Section 270.160, RSMo 1949, which provides:

> "Whenever any five or more townships in one body in any county in the state of Missouri have heretofore adopted the laws governing the question of restraining horses, mules, cattle, asses, goats, swine and sheep, or any two or more of the above named classes of animals, as provided in this chapter, then any one or more townships that have not adopted said law and that are adjoining said five or more townships in the same or an adjoining county, by a petition of twenty-five householders of each township desiring to adopt said law, petition the county court for the privilege to vote on the question of restraining horses, mules, asses, cattle, goats, swine and sheep, or any two or more of the above named classes of animals, from running at large, the same laws governing counties are hereby applied to said township or townships, and said petitioners shall not be debarred the right to restrain said animals if a majority of the qualified voters, voting on the question of restraining said animals, at any regular or special election in said township or townships, vote in favor of restraining said animals; provided, however, that nothing in this section shall be construed to prevent the petitioning for and holding of an election to permit animals to run at large in townships that have voted to restrain said animals from running at large."
> (Emphasis ours.)

In the case of State ex rel. Browning v. Juden, 264 S.W. 101, the Springfield Court of Appeals was construing the above statute, and, in holding that one or more townships which have in a separate election joined a body of five or more townships cannot withdraw in another separate election to permit animals to run at large, said at l.c. 102, 103:

> " * * * To hold that the proviso above quoted would permit one or more townships that had joined a body of five or more townships in restraining stock from running at large to vote separately on the question of permitting stock to run at large might lead to the absurd result of placing a single township in the position of restraining stock from running at large when no other township adjoining it was restraining them. * * *
>
> "Our conclusion is that one or more townships that have by separate election joined the body of five or more cannot withdraw in a separate election. * * *"

In other words, in the above case the court gave a construction to the proviso underscored in the above statute as not permitting a township which had joined a body of five or more townships in restraining stock from running at large to thereafter vote on the question of permitting stock to run at large.

In the very recent case of State ex rel. McMonigle v. Spears, 358 Mo. 23, 213 S.W. (2d) 210, the Supreme Court of Missouri, en Banc, was construing what is now Section 270.130, RSMo 1949, relating to two or more townships petitioning and voting to invoke the stock law. This statute also contains a proviso very similar to the one underscored in Section 270.160, supra, and which reads as follows:

> " * * * provided, however, that nothing in this section or chapter shall be construed to prevent the petitioning for and holding of an election to permit animals to run at large in any township or townships that have voted to restrain said animals from running at large, notwithstanding the county or township has theretofore voted to restrain animals from running at large."

In declaring the effect of the proviso the court, at S.W. l.c. 214, said:

> " * * * It has been held twice by the Springfield Court of Appeals, in whose district most of these cases arise, that the voters cannot do that. The first case was State ex rel. Browning v. Juden, Mo. App., 264 S.W. 101, decided in 1924. That case arose under Sec. 14479, the five township section, supra, which contains a proviso exactly like that appearing in the 1945 version of Sec. 14470a, except that the words 'or article' and 'any township or,' which we have italicised in setting out the statute above, were omitted. The Court of Appeals opinion construed the statute as meaning two townships could not vote themselves out of a five township unit because it would produce a confusing and unjust result by attrition.
>
> * * * * *
>
> "In response to that, evidently, the Legislature adopted the 1945 and 1947 versions of Sec. 14470a, applicable to two or more townships in one body in one county. In the proviso of the 1945 Act it added the words 'or article' and 'any township or', which we have italicised in setting it out above. This had the effect of excluding from consideration anything said elsewhere in the whole article, as bearing an implication against the proviso. And it further excluded the construction put on the statute in the Browning case, that two townships could not vote to permit stock to run at large if they had previously voted to restrain the stock. * * *" (Emphasis ours.)

The Supreme Court did not specifically overrule the Juden case, but as we read the decision in the McMonigle case, and particularly its reference to the construction given the statute being considered in the Juden case, we believe that the decision of the Springfield Court of Appeals was impliedly overruled.

In other words, the provisos contained in the two statutes above cited are substantially the same, and the construction given to the proviso contained in Section 270.130 would now be applicable in determining the construction to be given to the

proviso contained in Section 270.160, which we are considering in this opinion. Therefore, it would follow that the township in question adjoining the group of five townships would not be prohibited from voting to withdraw from the operation of the stock law after it had previously voted to invoke it.

CONCLUSION

It is therefore the opinion of this department that a township which has voted to invoke the stock law and to restrain stock from running at large, and which adjoins a group of five townships which have previously voted to enforce the stock law, is not thereafter precluded from withdrawing the operation of the stock law by holding an election in said township to permit animals to run at large.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:ml

LICENSES: Annual state license tax of ten dollars prescribed by Section 318.020, RSMo 1949, applicable to pool table.

COUNTY COLLECTORS: County collector has duty under Section 318.040, RSMo 1949, to collect any annual county license tax authorized under Section 318.040, RSMo 1949.

September 24, 1952

FILED
6

Honorable John W. Belew
Prosecuting Attorney
Ripley County
Doniphan, Missouri

Dear Mr. Belew:

The following opinion is rendered in reply to your request reading as follows:

> "Does Section 318.020 of the Revised Statutes of Missouri, 1949, in saying that billiard tables shall be licensed for the sum of twenty dollars for each billiard table, mean that each pool table shall also be licensed for the sum of twenty dollars or would a pool table come under the classification of the other tables where the license is only ten dollars? Black's Law Dictionery says that for the purposes of statutes a pool table is a billiard table with pockets and cites an Illinois case and a Louisiana case but in looking through the Missouri Digest I have been unable to find a Missouri case in point.
>
> "Section 318.030 states that the County may levy a tax which shall not be greater than is allowed for state purposes. The County Court has set a license fee of Twenty Dollars for each billiard table. Does the Collector collect both the State and County tax making a total of Forty Dollars for each table?"

Statutory provisions relative to the licensing of billiard tables and other tables kept and used for gaming, upon which balls and cues are used, are found in Chapter 318, RSMo 1949.

Section 318.010, RSMo 1949, provides as follows:

> "The county court shall have power to license the keepers of billiard tables, pigeonhole tables, jenny lind tables, and all other tables kept and used for gaming, upon which balls and cues are used. At each term, the clerk of said court shall prepare and deliver to the collector of their counties as many blank licenses for the keepers of such tables, herein mentioned, as the respective courts shall direct, which shall be signed by the clerk and attested by the seal of the court."

Section 318.020, RSMo 1949, provides as follows:

> "The collector shall deliver to any person who shall have been licensed, a license to keep any such table mentioned in section 318.010 in their respective counties, for a term of twelve months, upon the payment by the applicant of the sum of twenty dollars for each billiard table, and ten dollars for each other table described in said section, and the collector shall countersign such license before delivering the same to the applicant; provided, that if the applicant be the keeper of more than one of such tables, the number may be named in one license, and in such case the clerk shall not be entitled to more than one fee as provided in section 318.050."

Section 318.050, RSMo 1949, provides as follows:

> "The county courts shall charge the collectors with all blank licenses delivered to them, and at every regular term shall settle with the collectors for all such licenses delivered to them, and credit them with all the blank licenses which they may return, and at the same time the collectors shall pay the clerk respectively fifty cents for every such blank license not returned."

Section 318.060, RSMo 1949, provides as follows:

> "The collector shall stand chargeable with all the blank licenses not returned, and the county court at each regular term shall cause the clerks to certify to the state auditor the amounts with which the collectors stand chargeable, who shall charge the respective collectors accordingly."

In this opinion we are construing a licensing statute, and the general rule of construction to be followed is stated in the following language found in National Exhibition Co., v. City of St. Louis, et al., 136 S.W. (2d) 396, 235 Mo. App. 485, l.c. 493:

> "The general rule with respect to the imposition of license fees is stated in 62 C.J. 852, as follows:
>
> "'Ordinances imposing license fees, being in derogation of the common law, are to be strictly construed in favor of the person against whom they are sought to be applied.'
>
> "In 17 R.C.L. 475, the rule of construction of license laws is stated as follows:
>
> "'In construing a license tax law courts regard the substance and purpose of the ordinance rather than its form and language, and where doubt exists as to the meaning and scope of language imposing any tax, such doubt is to be resolved in favor of the taxpayer.'"

Section 318.020, RSMo 1949, quoted supra, clearly imposes an annual state license tax of twenty dollars on each billiard table, and an annual state license tax of ten dollars on "each other table" described in Section 318.010, RSMo 1949, which section definitely refers to billiard tables and "all other tables kept and used for gaming, upon which balls and cues are used." In such section pool tables are not specifically mentioned, but common knowledge attests the fact that pool tables are tables upon which balls and cues are used, and that the ordinary game of pool is a separate and distinct game from billiards. We construe Section 318.010 and Section 318.020, RSMo 1949, together, as limiting the annual state license fee for a pool table to ten dollars and that such table comes under the description of "all other tables kept and used for gaming, upon which balls and cues

are used" set forth in Section 318.010, RSMo 1949.

The second question posed in the opinion request relates to the duty of collecting these license taxes. Section 318.010, RSMo 1949, cited supra, discloses that the county court prepares and delivers to the county collector blank licenses for the keepers of the tables discussed herein, and Section 318.050, RSMo 1949, cited supra, discloses that the county collector is specifically charged with such blank licenses. After having been charged with such blank licenses, Section 318.060, RSMo 1949, provides that the county court at each regular term shall cause the county clerk to certify to the state auditor the amounts with which the collectors stand chargeable by reason of his possession of any blank licenses not returned by him to the county court. Such procedure makes the county collector the proper person to collect the annual state license tax on these tables. There still remains the question of the county collector's duty to collect any annual county license tax that may be set by the county court under Section 318.010, RSMo 1949, quoted supra, and Section 318.030, RSMo 1949, such latter section providing as follows:

> "No county court, city or town authorities shall levy a greater amount for a license tax on any table mentioned in section 318.010, for county, city or town purposes, than is allowed for state purposes."

We feel that the duty of the county collector to collect any annual license tax levied by the county court on these tables is found in the language of Section 318.040, RSMo 1949, which provides as follows:

> "The state, county, city or town, as the case may be, shall have a lien, and a lien is hereby created in their favor, upon any such table mentioned in section 318.010, to the amount of the licenses thereon; and if any owner or keeper thereof shall fail or refuse to pay to the respective collectors or other persons authorized to collect the same, the amounts of the licenses due the state, county, city or town, within ten days after such table shall be set up, then it shall be the duty of the respective collectors or persons authorized to collect such licenses to levy upon and seize such table or tables, and sell the same at public auction, for cash, to pay the amount of said licenses."

Honorable John W. Belew

In the statute just quoted above we find that a lien for the annual license tax on these tables is established, and that such lien is to be enforced by the respective collectors of the state, county, city or town, as the case may be when the keepers of such tables refuse to pay such license taxes "to the respective collectors or other persons authorized to collect the same." Nowhere in the statutes do we find that any person, other than the county collector is charged with the duty of collecting the county license tax which may be levied.

CONCLUSION

It is the opinion of this office that the annual state license tax of ten dollars prescribed by Section 318.020, RSMo 1949, for tables described in Section 318.010, RSMo 1949, is applicable to a pool table as distinguished from a billiard table, and that Section 318.040, RSMo 1949, makes it the duty of the county collector to collect not only the state license tax prescribed but also any annual county license tax authorized.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:lw

CIRCUIT CLERKS,)
)
FEES IN CASES OF)
)
CHANGE OF VENUE:)

The Circuit Clerk is entitled to retain all fees earned by him in any case of change of venue from another county.

FILED
9

April 8, 1952 4-9-52

Mr. Earl R. Blackwell
Assistant Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Mr. Blackwell:

We have given careful consideration to your request for an opinion, which request is as follows:

> "I should like an opinion upon the following situation:
>
> "When a case comes to Magistrate Court of County A from County B on a Change of Venue, and is subsequently appealed to the Circuit Court of County A, is the circuit clerk's fee non-accountable?"

The compensation of the circuit clerk in a county of the third class, wherein the offices of circuit clerk and recorder are separate, is provided in Section 483.330, RSMo 1949. This statute gives the circuit clerk, in addition to his regular salary, "all fees earned by him in cases of change of venue from other counties."

A situation such as that described in your letter is somewhat unusual and probably was not contemplated by the Legislature at the time the law was enacted. Magistrate courts were not inaugurated in this state until after the present Constitution was adopted in 1945. A change of venue from one county to another through the channel of magistrate courts is something new in our legal procedure. The appellate courts have not yet had occasion to construe the law pertaining to some of the questions that may arise in such cases.

Mr. Earl R. Blackwell

Having no definite decisions to guide us, we are bound to rely upon those well-known principles of law which hold that the intent of the Legislature and the rule of reason must be followed. Evidently the purpose of the law is to give the circuit clerk some extra pay for work done in a case coming from outside his own county. The case may come direct to the circuit court, or it may come via the magistrate court. In either case the clerk is burdened with additional services and should receive the extra pay. It is not unreasonable, therefore, to assume that the Legislature intended to make the proviso apply to all cases of change of venue from one county to another.

CONCLUSION

It is the opinion of this office that the circuit clerk in a county of the third class is entitled to retain all fees earned by him in any case of change of venue from another county coming direct to the circuit court or to such court on appeal from the magistrate court of the same county.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

BAT/fwh

COUNTY:
FISH AND GAME:
CONSERVATION:

County court may pay bounty on wolves killed in Barton County, Missouri, to non-resident exterminators of wolves. Such persons shall obtain ~~a hunting permit and~~ written permission of the local Conservation agent prior to hunting wolves in said county.

April 3, 1952 4/22/52

FILED
10

Honorable Gordon R. Boyer
Prosecuting Attorney
Barton County
Lamar, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

> "A group of professional wolf exterminators have talked to the County Court about operating in Barton County for the purpose of exterminating wolves by use of airplanes and hunting dogs. I have advised the County Court that they would have no control; that control would have to be exercised or permission given by individual farmers. The court has raised the question of whether the $30.00 bounty can be paid to these non-residents under the circumstances. They have also been advised by the local game warden that a hunting license will not be necessary since the men will be using hunting dogs and not guns.
>
> "Please advise me first whether it is legal for the County Court to pay the bounty and second whether it is necessary for these individuals to have non-resident hunting licenses."

In answer to your first inquiry -- that is, whether it is legal for the county court to pay a bounty to the parties referred to in your request on wolves killed by them in Barton County, Missouri -- we are enclosing a copy of an opinion rendered by this department to Honorable Gene Frost, Prosecuting Attorney of Jasper County, Missouri, under date of March 24, 1952. Said opinion holds that on and after March 18, 1952, the county court shall pay the sum of $30.00 for any grown coyote or wolf and $5.00 for each coyote or wolf pup which

may be killed in the county, and that the state shall reimburse the county treasurer two-thirds of all the bounty paid by such county.

Therefore, we are of the opinion it is legal for the county court to pay a bounty to these so-called exterminators only on the wolves killed in Barton County, Missouri, in the amount specified in said opinion.

You further inquire as to whether it is necessary for these non-resident professional wolf exterminators to obtain a non-resident hunting license. This is controlled entirely by the Wildlife Code of Missouri, 1951, an examination of which discloses the following rules:

Section 38 provides that wildlife may be taken, used or possessed only by persons who, at the same time, have in their possession the prescribed permit to do so, or who are specifically allowed by the Code to do so without a permit.

Section 6 further provides that no wildlife may be taken by means of a gun, bow and arrow or other device designed for the taking of same at any time from any motor vehicle or airplane, provided however, that written permission may be granted to individuals to take coyotes and wolves from an airplane.

Section 14 authorizes the taking of unprotected wildlife at any time in any numbers by such methods that do not conflict with said Code. Then, it specifically defines unprotected wildlife to be wildlife other than certain mentioned animals and fish, and continues by providing that unprotected wildlife shall also include wolves, coyotes, etc., and concludes by authorizing organized wolf drives under conditions as set forth in a special permit that may be obtained without fee.

Section 54 in part provides that no participation therein (referring to field trials) or in any organized wolf drive as herein provided shall be required to hold a hunting permit, provided however, non-residents participating in organized wolf drives shall possess the required permit while carrying a gun, rifle or other device designed for the taking of wildlife.

In view of the foregoing, it appears that wolves are not protected under the Code and that organized drives on wolves may be conducted under conditions set forth in special permits obtained without fee upon application to the local Conservation

agent, and furthermore, wolves may be taken by airplanes only by first obtaining from the local agent a written permission to do so. However, in order to participate in an organized drive on wolves, a non-resident must also obtain a hunting permit, if while hunting wolves he is carrying a gun, rifle or other device designed for taking wildlife.

Applying the same rules of construction applicable to construing legislative and congressional acts to the construction of rules and regulations adopted by the Conservation Commission, we must hold that only non-residents participating in an organized wolf drive must first obtain a hunting permit in order to participate in said drive, provided while hunting wolves he is carrying a gun, rifle or other device designed for taking wildlife; and furthermore, any person hunting wolves by airplane must obtain a written permission to do so from the local Conservation agent.

CONCLUSION

Therefore, it is the opinion of this department that it is legal for the County Court of Barton County to pay a bounty to these non-resident exterminators of wolves that are killed in Barton County, Missouri, in the amount specified in the attached opinion. Furthermore, said non-resident exterminators are required to obtain a written permission to hunt wolves from the local Conservation agent prior to hunting said wolves. However, said non-resident exterminators need not obtain a hunting permit unless while hunting wolves they are carrying a gun, rifle or other device designed for taking wildlife.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARH:VLM

STATE:)
CONSERVATION COMMISSION:) Land purchased by the State in a Drainage
DRAINAGE DISTRICT:) District subsequent to the organization
TAXATION:) and formation of said Drainage District, is not subject to an annual maintenance tax.

FILED
10

September 2, 1952

9/24/52

Mr. I. T. Bode, Director
Missouri Conservation Commission
Jefferson City, Missouri

Dear Mr. Bode:

This will acknowledge receipt of your request for an official opinion which reads:

> "We request your opinion on matters herein stated.
>
> "The Conservation Commission of Missouri had acquired and is acquiring altogether about four thousand acres of swamp, wet and overflowed lands in Wayne, Bollinger and Stoddard Counties for the purpose of establishing and maintaining a public improvement known as Duck Creek Wildlife Area. Our acreage in Bollinger and Stoddard Counties is located within the boundaries of the Little River Drainage District; but Wayne County is not in said District.
>
> "Little River Drainage District is a district organized and existing under the provisions of sections 242.010-242.690 R.S. Mo. 1949, it being one organized by the Circuit Court thereunder. It has been in existence for many years and is today still functioning as such. We are advised that on April 1, 1952, the District paid off all its bonds; and that now the District Board needs to levy and plans to levy only the maintenance tax authorized by section 242.490. That section indicates the levy is made on or before September in each year; and presumably such levy was made last September and will be made this coming September. A good portion of the Commission acreage was acquired before September, 1951, and some has been acquired since.

"These facts may or may not be necessary in arriving at your conclusion. The lands acquired and being acquired in Bollinger and Stoddard Counties are traversed and drained by ditches constructed and maintained by the Drainage District. In order to procure a supply of water for use in and over the Area, at least one of the ditches of the Drainage District will be lengthened so as to connect it with the Castor River. Certain of the ditches through the Commission lands will be widened, deepened and improved; and all of the Drainage ditches in the Area will be used in bringing and furnishing the necessary water. The District will in writing agree and consent to such extensions, improvements and uses, and they will be convenient and beneficial in the construction, maintenance and operation of the Area. As indicated, we do not know whether such consent and use will affect your opinion on the conclusion asked.

"We ask you the following:

"Are said lands, owned by the Commission (that is, the State) in the Area, subject to or exempt from any such maintenance tax as may have been levied or may be levied after the acquisition of a tract?

You inquire if the Conservation Commission is liable for a so-called annual maintenance tax assessed against land owned by said Commission lying within the Little River Drainage District.

Under Section 242.020, RSMo 1949, the original owners of said land apparently agreed to the expense of organization and of making and maintaining the necessary improvements to effect the reclamation of said lands in said Drainage District and to further protect the same from the effects of water.

Section 242.490, RSMo 1949, authorizes the board of supervisors of such drainage district, upon the first day of September each year after the completion of improvements, to levy a tax upon each tract of land within the district and upon corporate property to be known as a maintenance tax.

Section 242.260, RSMo 1949, specifically provides that said board of supervisors of the district, in assessing benefits to lands, public highways, railroads and other right-of-ways, railroad roadbeds and other property not traversed by such works

and improvements as provided in the plan for reclamation, shall not consider what benefits will be derived by such property after other ditch improvements and other plans for reclamation shall have been constructed, but shall assess only such benefits as will be derived from the construction of works and improvements set out in the plan of reclamation or as same may afford an outlet for drainage or protection of overflow of such property; that the public highways, railroads and other right-of-ways, roadbeds, railroad and other property shall be assessed according to the increased physical efficiency and described maintenance cost of roadbeds by reason of the protection to be derived from the proposed works and improvement.

It can be seen that under the foregoing statutes no specific authority is given to tax lands owned by the State of Missouri and lying within such a drainage district unless we consider corporate property as that owned by the state, which, of course, would not include this land owned by the State of Missouri for the reason corporate property ordinarily has been defined by the Courts as property held in a proprietary capacity and not governmental capacity. In this instance, the Conservation Commission of the State of Missouri has acquired this property under authority of Section 41, Article IV, Constitution of Missouri, 1945, and, therefore, holds same in their governmental capacity.

Section 6, Article X, Constitution of Missouri, 1945, specifically exempts from taxation all property real and personal of the State of Missouri, and further provides that all laws exempting from taxation property other than the property enumerated in said Article X shall be void. Section 137.100 RSMo 1949, among other things, provides that the following subjects shall be exempt from taxation for state, county or local purposes; land and other property belonging to the state.

It is a well established rule of statutory construction that in construing taxing statutes if said statutes do not specifically include the state that the state is exempt from such taxation. See Section 87, Volume 48, page 692, Am. Jur.; also 115 Mo. 557, 22 S.W. 37, 37 Am. Sts. Rep. 415. (See also Normandy Consolidated School District vs. Wellston Sewer District, 77 S.W. (2) 477, l. c. 478-479 [2-3]).

The courts have also held that drainage districts only have such power as conferred upon them by an act of the Legislature and necessary implied power to carry out the express power granted by

the Legislature. See Grand River Drainage District of Cass and Bates County v. Reid, 341 Mo. 1246, 111 S.W. (2d) 151.

Furthermore, the courts have held that the Legislature may say that public property may be benefited by public improvements and that a municipality be made to respond to assessments therefor by a general judgment to be paid out of funds in the general treasury. See Drainage District No. 1 of Bates v. Bates County, 269 Mo. 78, 189 S.W. 1176. The courts have also held that such assessments are not enforceable against public roads and highways by foreclosure of lien and sale, but by judgment. See Drainage District v. Trail Creek Township, 371 Mo. 933.

The General Assembly of the State of Missouri has specifically authorized said drainage district to assess public roads and highways, railroads, etc., for benefits. However, no such specific authority has been granted to tax lands of the State of Missouri. By so doing we may assume that the legislative intent was that said State land is not subject to such assessment under the well-known canon of statutory construction, that the expression of one thing is exclusion of another. Kansas City v. J. I. Case Threshing Machine Co., 87 S.W. (2) 195, 337 Mo. 913.

So, if we are to consider this maintenance tax as a tax, then definitely the Little River Drainage District cannot legally assess such tax against land owned by the state or the Conservation Commission as the case may be and located within said drainage district.

However, let us examine the law to determine if it is actually a tax or merely an assessment benefit. The statute clearly denotes it as a tax. However, in State ex rel. Drainage District No. 28 of New Madrid County, et al, v. Thompson, 41 S.W. (2d) 941, l. c. 945, the Court said:

> "The uniform tax laws of our Constitution invoked by respondent has no application to this case for the reason that special assessments levied in a drainage district to pay for local improvements made in the district are not taxes within the meaning of this clause of the Constitution. (cases cited)."

The Appellate Courts in this state have on numerous occasions held that special benefit assessments cannot be legally assessed against public property in the absence of an express enactment or clear implication. In Normandy Consolidated School District vs. Wellston Sewer District, supra., at l. c. 479, the court said:

"[4] Now in the case at bar there is no claim that the Legislature made any express mention of school property as being subject to assessment for the special taxes provided for in the law, but what the sewer district does insist is that such a legislative intent is clearly and necessarily to be implied from the all-inclusive nature of the language used. Suffice it merely to say that by section 11037 of the law (Mo. St. Ann. Sec. 11037, p. 7405) it was provided that a uniform tax should be levied 'upon all the lands' within any sewer district, and by section 11044 (Mo. St. Ann. Sec. 11044, p. 7411) that upon the assessment of benefits a tax of a portion of such benefits should be levied 'on all lots, tracts and parcels of land, railroad and other property in the district,' said tax to be apportioned to and levied 'on each lot, tract, or parcel of land or other property in said district' in proportion to the benefit assessed. No doubt similar expressions are to be found elsewhere in other sections of the act, but the provisions heretofore specifically referred to are enough to indicate the general character of the language used by the Legislature in designating the property it intended to be held subject to the tax.

"At first blush it might indeed seem that a legislative intent to hold public property subject to the assessment would be implied from the language requiring the tax to be levied upon all the lands, lots, tracts, and parcels of land in the district, and yet as the authorities run such mere general language may not be held to constitute the expression of a clear intent that public property should be liable to the tax along with all private property.

"In City of Edina, etc., v. School Dist., etc., supra, the statute provided that the cost of paving and curbing all streets should be levied as a special assessment 'upon all lots and pieces of ground upon either side of such street * * * abutting thereon,' and yet the Supreme Court in banc held that such language was not sufficient

> to warrant the imposition of such special assessment upon the defendant school district which was sued upon tax bills issued against its property which abutted upon the street improved and received the benefit of the improvement. A similar result was reached in City of Clinton v. Henry County, supra, where the law provided that the assessment should extend to 'all lots and parcels of ground on either side of such street,' but was held not to include property benefited by the improvement but held by the county for strictly public purposes.
>
> "So in the case at bar we must hold that the terms of the sewer law did not reveal a clear legislative intent that school property should be subject to the imposition of the taxes provided for therein, and as adding support to this idea it is not amiss to point out that the provisions made for the collection of the taxes likewise refute any idea that public property was intended to be taxed.
> * * * * * * * * * * * * * * * * "
>
> (Underscoring ours)

See also, City of Edina v. School Dist., 305 Mo. 452, 267 S.W. 112, 113; 36 A.L.R. 81532.

There are Federal District Court cases construing similar state statutes in Oregon and other states that hold benefit assessments can be made against state and federal owned land in drainage district. See United States v. Aho, 68 Fed. Sup. 358, wherein the United States Government was condemning land in a drainage district. The government's contention was, that it was only necessary to pay the fee title owners of said land and not necessary to allow for any annual assessments against said land by the drainage district. The court held that such benefits are concomitants of easements appurtenant to the particular parcel of land in said drainage district. However, in the State of Oregon there was specific legislative authority for such assessments against the State of Oregon, which is not the case in Missouri, and the District Court held all of the land was subject to the assessment, that to not assess government owned land therein might destroy drainage districts.

However, in view of the foregoing Missouri Appellate Court decisions which have not been specifically overruled holding that such an annual assessment is not a tax but merely a benefit assessment and that the immunity provision of the constitution of Missouri from taxation is not applicable, and further in view of the foregoing decisions holding that even before such benefit assessments can be

Mr. I. T. Bode, Director

assessed against state owned land there must be statutory authority specifically providing for the assessing of such benefits against state owned property or clear implication, we are forced to conclude that such benefit assessments cannot be assessed against the state owned land within said drainage district.

CONCLUSION

It is the opinion of this department that the land in question located within the Little River Drainage District and presently owned by the State of Missouri, for the use and benefit of the Conservation Commission is not subject to an annual maintenance tax assessed by said drainage district.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARH:A

MOTOR VEHICLES: Over weight fine under Section 304.240, Laws of Mo., 1951, is minimum fine not maximum and minimum fines are bracketed in accordance with amount of overweight.

FILED
10

10/24/52

October 23, 1952

Honorable Gordon R. Boyer
Prosecuting Attorney
Barton County
Lamar, Missouri

Dear Sir:

This office is in receipt of a request from you for an official opinion, which is as follows:

> "I have been advised by members of the State Highway Patrol that Section 304.240 has been interpreted to mean that in the event of an over weight truck in excess of 1000 pounds the fine is 10¢ per pound for the entire load.
>
> "For example I had a truck this morning over weight 1100 pounds. I interpreted the fine to be $10.00 for the first 500 pounds, $25.00 for the next 500 pounds and $10.00 for the next 100 pounds, a total of $45.00. Under the interpretation of the Highway Patrol the fine would be $110.00 at the rate of 10¢ per pound for each pound.
>
> "Please advise me the correct interpretation of this section."

Section 304.240, Missouri Revised Statutes, Cumulative Supplement, 1951, reads as follows:

> "Any person, firm, corporation, partnership or association violating

> any of the provisions of sections 304.170 to 304.230 shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than five dollars or by imprisonment in a county jail for a term of not exceeding twelve months, or by both such fine and imprisonment; provided, however, that where load limits as defined in sections 304.180 to 304.220 have been violated, the fine shall not be less than two cents for each pound of excess weight up to and including five hundred, and five cents for each pound of excess weight above five hundred and not exceeding one thousand, and ten cents for each pound in excess weight above one thousand; provided, that the court may, in its discretion, cause to be impounded the motor vehicle operated by any person violating the provisions of this section until such time as the fine and cost assessed by the court under this section is paid. (304.240, A.L. 1951 H.B. 325)".

It may be noted from the text of the above section that there is no maximum fine fixed by it. There is a maximum term of imprisonment which is to not exceed twelve months.

There is an express proviso in Section 304.240 to the effect that where load limits are violated, the fine shall be upon a rising scale, that is, not less than two cents per pound for each pound of excess weight up to and including 500, five cents for each pound of excess weight above 500 and not exceeding 1,000, and ten cents for each pound of excess weight above 1,000. We understand by this that the Legislature intended to fix a minimum fine for overweight and to bracket those fines in accordance with the extent of the overweight. The amount of an overload certainly has a definite relation to the culpability of the offense. The above section is definite in each step of the upward scale in that it is written "for each pound" and prescribes an amount for that pound.

In State ex rel. vs. Wilder, 206 Mo. 541, concerning the construction of statutes, the Court said, l.c. 549:

Honorable Gordon R. Boyer:

> "* * * On the other hand, it is equally well settled that words and phrases shall be taken in their plain or ordinary and usual sense, and that it is incumbent upon the courts to construe a statute as written, without regard to the results of the construction, or the wisdom of the law as thus constructed. * * * ."

The purpose of the statute seems to be to prohibit the operation of overloaded vehicles upon the highways of this state and to assess a fine in proportion to the extent of the overweight.

Section 304.240, supra, provides only for minimum fines. The only maximum provided was imprisonment in jail, not exceeding twelve months. There is no attempt to set the exact amount that the court or jury may fine. Only limitation upon the minimum amount of the fine is provided.

In other words, a minimum of $10.00 for the first 500 pounds, $25.00 for the next 500 pounds and ten cents a pound for each pound over 1,000 pounds.

CONCLUSION.

Therefore, it is the opinion of this office that Section 304.240, A.L. 1951, H.B. 325, prescribes a minimum fine for load limit violations and brackets the fine in accordance with the extent of the overweight.

Respectfully submitted,

JAMES W. FARIS
Assistant Attorney General

APPROVED:

J. E. TAYLOR,
Attorney General

JWF:irk

OFFICERS: Sheriff of third class counties entitled
SHERIFFS: to mileage for making investigation of
FEES AND SALARIES: persons accused of or convicted of a criminal offense.

FILED
11

January 16, 1952

Honorable Edwin F. Brady
Prosecuting Attorney
Benton County
Warsaw, Missouri

Dear Sir:

Your letter at hand requesting an official opinion of this department, which reads as follows:

> "Section 57.430 provides among other things that sheriffs and their deputies shall be allowed actual expenses, not to exceed 7 cents per mile, maximum $75.00 in any one month, for 'investigation of persons accused of or convicted of a criminal offense.'
>
> "Does this or any other existing law provide mileage or compensation for the sheriff in investigating accidents, drownings and other occurrences which the sheriff is ordinarily called to investigate, but where no charge has been filed and in many cases where no charge is ever filed?
>
> "In many cases, almost all of the investigation is done before the person is accused, and in many cases where much investigation is required, it is finally determined that no charges can be filed."

It is assumed that the investigations to which you refer in your request are performed in connection with the duties imposed upon him by Section 57.110, RSMo 1949, which requires him to be a conservator of the peace within his county.

Honorable Edwin F. Brady

Section 57.430, RSMo 1949, as amended by House Bill No. 100, enacted by the 66th General Assembly, provides for the sheriff of third and fourth class counties receiving mileage in connection with the performance of certain duties. Thus the statute, in part, provides:

> "In addition to the salary provided in sections 57.390 and 57.400, the county court shall allow the sheriffs and their deputies, payable at the end of each month out of the county treasury, actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed seven cents per mile, and actual expenses not to exceed seven cents per mile for each mile traveled, the maximum amount allowable to be seventy-five dollars during any one calendar month in the performance of their official duties in connection with the investigation of persons accused of or convicted of a criminal offense. * * *"

Your inquiry asks what mileage the sheriff of a third class county is entitled to receive, if any, in making investigations of accidents, drownings and other occurrences in connection with which formal charges may or may not be subsequently instituted.

The Supreme Court of Missouri has many times held that for a public officer to be entitled to be compensated for services rendered, such as a fee, salary or mileage, he must point to the statute authorizing such payment, and unless the statute clearly provides for such payment, the services rendered by a public officer are deemed to be gratuitous. Thus, in Nodaway County v. Kidder, 344 Mo. 795, 129 S.W. (2d) 857, 860, the rule was stated as follows:

> "The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such

> statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S.W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S.W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.
>
> "It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S.W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S.W. 655; Williams v. Chariton County, 85 Mo. 645."

Consequently, in construing Section 57.430, supra, we must apply the rule as declared in the above case.

If subsequent to an investigation made by the sheriff of the kind of accidents referred to in your request or of other occurrences further action was taken resulting in the formal accusation of a person with the commission of a criminal offense, such as the filing of a complaint, information or return of an indictment by a grand jury, we believe the sheriff would be entitled to mileage as provided by the above statute, even though no individual was brought to trial and no conviction was ultimately obtained. Under such circumstances we believe that such an investigation would have been made of a person accused of a criminal offense within the meaning of the statute.

Nor do we believe that it would in all instances necessarily require a person to be charged with a crime by formal judicial procedure for the sheriff to be entitled to mileage who made an investigation of such person against whom the accusation was made.

For example, if a sheriff was apprised of facts involving certain acts of a person or persons which would constitute the commission of a crime and thereafter undertook to make his investigation, we believe this would be sufficient to entitle him to his mileage incurred by making such investigation.

In the case of Galloway v. Department of Motor Vehicles, 231 N.C. 447, 57 S.E. (2d) 799, the Supreme Court of North Carolina was considering workmen's compensation death claims for the death of two highway patrolmen caused by an airplane accident. A convict has escaped, and a woman reported to the

patrolmen that an escaped convict had come to her house, dressed in stripes and armed with a pistol, and had threatened to kill her whole family if he wasn't given something to eat. The house was located in an isolated section, and in making their search for the convict the two patrolmen, one of whom was a licensed pilot, procured the use of a small airplane. The plane subsequently crashed, killing both of them. The defense to the claims was that the patrolmen were acting without authority and outside the scope of their employment.

The statute referring to the authority of the Highway Patrol provided that "such officers may at any time and without special authority, either upon their own motion or at the request of any sheriff or local police authority, arrest persons accused of highway robbery, bank robbery, murder, or other crimes of violence." In upholding the claims, the court, at S.E. 802, said:

> "The contention of the appellees is that the officers who undertook to find and arrest the subject of Miss Stevens' information had authority to act in the premises 'upon their own motion' because her information amounted in substance to an accusation of a 'crime of violence' within the purview of the statute, to wit: Armed robbery from the person, since he was fed or food given him because his statement that he wanted something more to eat was backed by a display of firearms and a threat to kill. We think this statement, made to the patrolman, may be reasonably so construed.
>
> " * * * In the much narrowed area of discussion as to the source of authority it makes no difference as to the status of the man sought as an escaped convict - whether he wore stripes or dungarees, or hailed from Kalamazoo or Timbuktu. He was a man accused of a crime definitely analogous to those named in the cited law, or if not so, then covering a still more extensive category as a crime of violence and it makes no difference whether we apply the principle ejusdem generis to the latter phrase or accept it as an independent delegation of authority.

Honorable Edwin F. Brady

> "It is clear, we think, that the term 'accused' was not used in the law in a technical sense but in the generic and popular sense. It is defined in Bouvier's Law Dictionary Rawle's Third Revision, page 112 as : 'To charge or impute the commission of crime or immoral or disgraceful conduct or official delinquency. It does not necessarily import the charge of a crime by judicial procedure; State v. South, 5 Rich (S.C.) 489, 493; Com. v. O'Brien, 12 Cush. 84 (66 Mass. 84); Robbins v. Smith, 47 Conn. 182; 1 C. & P. 479.'"

However, looking again to your request, it is our thought that if a sheriff made an investigation of an incident based on facts reported to him which did not suggest the commission of a crime by a person or persons, and thereafter no further action was taken to accuse or charge a person or persons with the commission of a criminal offense, the services rendered by the sheriff in making said investigation would be gratuitous, for in such an instance the statutes do not entitle the sheriff to mileage. For example, if a sheriff was merely notified that a drowning had occurred in a particular location, which he thereafter undertook to investigate, we do not believe that he would be entitled to any mileage in making his investigation, for the reason that the facts or incident reported to him did not suggest or indicate that a criminal offense had been committed.

CONCLUSION

In the premises, it is the opinion of this department that a sheriff of a third class county would be entitled to mileage under Section 57.430, RSMo 1949, as amended by House Bill No. 100, enacted by the 66th General Assembly, exclusive of that allowed when serving warrants or other criminal processes, for making investigations which are based upon reported facts indicating that a criminal offense has been committed by a person or persons.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:ml

MARRIAGES:
VITAL STATISTICS:
RECORDERS:

Section 451.080, RSMo 1949, setting forth the form of marriage license not superseded by Section 193.360, RSMo 1949.

FILED
11

April 28, 1952

4-2-52

Honorable Clyde Bridger
Vital Statistics Registrar
Division of Health
Jefferson City, Missouri

Dear Mr. Bridger:

This is in reply to your request for an opinion which is as follows:

> "Considerable confusion seems to exist as to the role that the Division of Health plays in the filing of records connected with marriages, divorces, adoptions, annulments of marriage and annulments of adoption. We shall appreciate your clarification.
>
> "(1) Marriages.
>
> "(a) Sections 451.080 to 451.210 inclusive relate to the Recorder's part in handling application for marriage and marriage license. Sections 193.340 to 193.360 inclusive relate to the Division of Health and its duties in connection with the same subject. In particular, Section 451.080 sets forth a specific form for the Recorder to use and Section 193.360 states that this office shall prepare the proper form for the Recorder to use. The basic question is: Does Section 193.360 supersede Section 451.080?
>
> "We are enclosing samples of the forms now being used for the collection of the information requested in Sections 193.340 to 193.360."

You further ask concerning the duties of a clerk with regard to information which he is required to furnish the Division in cases of divorces, annulments and adoptions. In answer to that question we are enclosing a copy of an opinion (Hall - 1948) which sets forth the information which may be required by the Division from the clerk of the court.

In your request you seem to indicate that there is a possibility of a conflict between the form of a marriage license and the form which is to be filled out by the recorder and forwarded to the Division of Health. The statutes providing for these forms are as follow:

Section 193.360, RSMo 1949:

> "For each divorce, annulment of marriage, adoption or annulment of adoption, the clerk of the court shall prepare within thirty days after the decree becomes final, certificate of such decree on a form furnished by the state registrar; and before the fifteenth day of each calendar month the clerk shall forward to the state registrar the certificates prepared by him during the preceding calendar month."

Section 451.080, RSMo 1949:

> "1. The recorders of the several counties of this state, and the recorder of the city of St. Louis, shall, when applied to by any person legally entitled to a marriage license, issue the same which may be in the following form:
>
> "State of Missouri)
>) ss.
> County of _____)
>
> "This license authorizes any judge, magistrate, licensed or ordained preacher of the gospel, or other person authorized under the laws of this state, to solemnize marriage between A B of _____, county of _____ and state of _____, who is _____ the age of twenty-one years, and C D of _____, in the county of _____, state of _____, who is _____ the age of eighteen years.
>
> "2. If the man is under twenty-one or the woman under eighteen, add the following:
>
> "The father or mother or guardian, as the case may be, of the said A B or C D (A B or C D, as the case may require), has given his or her assent to the said marriage.

"Witness my hand as recorder, with the seal of office hereto affixed, at my office, in _____, the _____ day of _____, 19 ___. _____, recorder.

"3. On which said license the person solemnizing the marriage shall, within ninety days after the issuing thereof, make as near as may be the following return, and return such license to the officer issuing the same:

"State of Missouri,)
) ss.
County of _____.)

"This is to certify that the undersigned _____ did at _____in said county, on the _____ day of _____, A.D. 19 __, unite in marriage the above-named persons."

We are not of the opinion that such a conflict actually exists, and in this connection we refer to the Hall opinion which is being forwarded in answer to your other question. You will note that it is the recorder's duty to issue a license even though he is unable to obtain all the information which you require in the forms which you have furnished to the recorders. Repeals by implication are not favored, and we see nothing in Section 193.360, RSMo 1949, which would seem to indicate that it was the intention of the Legislature to supersede Section 451.080, RSMo 1949.

CONCLUSION

Therefore, it is the opinion of this department that Section 451.080, RSMo 1949, providing for the form of a marriage license has not been superseded by Section 193.360, RSMo 1949, which provides for forms to be used by a recorder in sending the information concerning marriages to the Division of Health.

Respectfully submitted,

APPROVED:

JOHN R. BATY
Assistant Attorney General

J. E. TAYLOR
Attorney General

COUNTY BUDGET LAW:

General county revenue may be budgeted in Class 6 for the construction, repair and maintenance of bridges.

FILED
11

June 27, 1952

7-1-52

Mr. Edwin F. Brady
Prosecuting Attorney of
Benton County
Warsaw, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department which request reads in part as follows:

> "If the county court runs the thirty-five cent levy under Art. X, sec. 12(a) for the road and bridge tax, is the court permitted to budget any funds to be raised out of the general revenue levy under Section 137.065 to be expended for the construction and repair of bridges and to set the same up in class 6 of the budget?"

Section 50.680, RSMo 1949, in regard to Class 6 provides as follows:

> "After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose; provided, however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six; provided, that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class six."

It is noted that this section provides that after the first five classes have been provided for, the balance may be budgeted in class six to be used for any lawful purpose. To answer your inquiry we must determine whether the purpose for which your county court is contemplating expenditure of money from class six are lawful purposes. In other words, is it lawful for the county court to construct and repair bridges? We turn to the statutes for the answer.

Section 234.010, RSMo 1949, provides that it shall be the duty of the county court to determine what bridges shall be built and maintained by the county and what by the road districts as follows:

> "Each county court shall determine what bridges shall be built and maintained at the expense of the county and what by the road districts; provided, that no road district shall be compelled to build a bridge which costs fifty dollars or more."

Section 234.040, RSMo 1949, provides that a road district shall not be required to repair any bridge where the cost is more than fifty dollars.

Section 234.020, RSMo 1949, provides that the construction of all bridges costing over fifty dollars shall be under the supervision of the county highway engineer.

Section 234.030, RSMo 1949, provides that bridges damaged by flood, or otherwise in immediate danger of falling in or dangerous to public travel, may be repaired and an allowance shall be made for such repair by the county court.

Section 234.060, RSMo 1949, provides that where under certain circumstances taxpayers petition the county court for a bridge the county court, may, within their means, appropriate one-half of the funds needed for construction. Other provisions of Chapter 234 authorized the county courts to appropriate money for the construction of bridges between two counties or across state lines.

Section 233.115, RSMo 1949, provides that the county court may in its discretion out of county funds, construct, repair or maintain bridges in a special road district or appropriate money to the road district to assist in the construction, repair, or maintenance of bridges in the road district.

Although, the above cited statutory provisions are not intended to be exhaustive of the statutes relating to the duties of the county court in regard to the construction or repair of bridges or the

appropriation of money therefor, we believe that they are sufficient to show for the purpose of this opinion, that where authorized by statutes the construction, repair and maintenance, of bridges is a lawful purpose for which county moneys may be expended. From the foregoing we therefore conclude that the construction, maintenance and repair of bridges where authorized are lawful functions of the county court whenever there are available funds for said purpose.

CONCLUSION

Therefore, it is the opinion of this department that, subject to the provision of Section 50.680, RSMo 1949, that the preceding five classes shall first be provided for, the county court would be permitted to budget funds to be raised out of a general revenue levy in class six to be used for the construction, repair or maintenance of bridges, since such construction, repair or maintenance is a lawful county function.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DDG:hr

CONVICTS NOT AUTOMATICALLY RESTORED TO CITIZENSHIP

Persons released from penitentiary on the seven-twelfths rule are not automatically restored to citizenship at the expiration of two years from the date of discharge.

FILED
13

September 4, 1952

9-4-52

Hon. Donald W. Bunker
Executive Secretary
Board of Probation and Parole
Jefferson City, Missouri

Dear Mr. Bunker:

Your letter of March 28, 1952, asking this office for an official opinion is quite lengthy and for that reason we are only quoting a part thereof. The part of your letter which presents the question to be answered reads as follows:

> "James Harvey Hamblin was discharged from the Penitentiary under Conditional Commutation by Governor Park on October 1, 1934. This was in accordance with the 7/12ths Executive Rule in force at that time and affecting the release of inmates from the State Penitentiary. The subject's 3/4ths time was December 15, 1935.
>
> "The question is whether the civil disabilities incurred by this conviction ceased at the end of two years from the discharge under Conditional Commutation."

The remaining part of your letter, without quoting same, has to do with the removal of one's civil disabilities where he has been discharged or released from the penitentiary under the old seven-twelfths executive rule, the same as though released under the nine-twelfths law.

Section 217.370, RSMo, 1949, being the three-fourths or nine-twelfths law provides that, any convict confined in the penitentiary or the intermediate reformatory, who shall serve three-fourths of the time, for which he or she may have been sentenced, in an orderly and peaceable manner, without having

any infractions of the rules of the institution or laws of the same recorded against them, shall be discharged in the same manner as if such convict had served the full time of their sentence. You will note from the language, which is not the statute verbatim, it says that whoever serves three-fourths of the time in the penitentiary shall receive this consideration. The statute goes on to say that at the end of two years after a person has been discharged from the above mentioned institutions if it is his first felony offense, shall be restored to all rights of citizenship provided that they have not been indicted or informed against during the time of their incarceration.

In order to receive the benefits of this law it is necessary that the convict, in order to be restored to all rights of citizenship, be discharged in accordance therewith. Therefore, one who was released on conditional commutation under what was called the old seven-twelfths rule would not have complied with requirements of the three-fourths rule of having served three-fourths of their sentence in the penitentiary or intermediate reformatory and unless the statute is complied with the benefits thereof could not be extended to convicts who have been released through other measures.

It is therefore obvious that Section 217.370, supra, of the Revised Statutes of Missouri, 1949, would not apply with equal force to inmates who have been released from imprisonment on the old seven-twelfths Executive Rule, by the Governor's conditional commutation of sentence.

CONCLUSION

Therefore, it is the opinion of this department that convicts who have not complied with the requirements of Section 217.370, RSMo, 1949, would not automatically be restored to all the rights of citizenship.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:lw

PROBATION OFFICERS:

Supreme Court Rule #27.07 page 43, Rules of Criminal Procedure for Missouri Courts adopted by Supreme Court of Missouri, April 14, 1952, effective January 1, 1953.

Rule 27.07 of Rules of Criminal procedure within meaning of Article V, Section 5 of the Constitution of Missouri Board of Probation and Parole is bound by said Rule 27.07.

December 22, 1952

12/29/52

FILED

13

Hon. Donald W. Bunker
Executive Secretary
Board of Probation and Parole
Jefferson City, Missouri

Dear Mr. Bunker:

We are in receipt of your recent letter in which you request an opinion of this department. Your letter is as follows:

> "Rule 27.07, Page 43, Rules of Criminal Procedure for the Courts of Missouri, adopted by the Supreme Court of Missouri, April 14, 1952, effective January 1, 1953, has been called to the attention of the Board of Probation and Parole. The rule provides:
>
> > "(b) 'When a probation officer is available to any Court having original jurisdiction to try felony cases and to the St. Louis Court of Criminal Correction, such probation officer shall, unless otherwise directed by the Court, make a presentence investigation and report to the Court before the imposition of sentence or the granting of probation.'
>
> "Section 549.270, RS 1949 states 'At the request of the Judge of any Circuit or Criminal Court of this State the Board of Brobation and Parole shall assign one or more officers to act as probation officers for such Court. Upon request of such a judge, the Board of Probation and Parole shall make an investigation of any person convicted of any crime or offense before execution of sentence and shall make the report to such Judge. (L. 1945, p. 723 § 43)"
>
> "The Board of Probation and Parole would appreciate

> receiving your interpretation of Rule 27.07 as it relates to Section 549.270, RS 1949. For example, if a Judge of a Circuit Court requests this Board to assign a probation officer to the Court in accordance with Section 549.270, RS 1949, shall the probation officer then serving that Court 'unless otherwise directed by the Court, make a presentence investigation and report to the Court before the imposition of sentence or the granting of probation'?"

Your specific question seems to be whether or not when a probation officer has been made available to a court pursuant to the provisions of Section 549.270, RSMo 1949, such probation officer shall make presentence investigations unless directed to the contrary by the court even though the Board of Probation and Parole shall not have been requested by the court to make such investigation.

In this connection we shall first consider Section 549.270 RSMo 1949 quoted in your letter above. This section contains two provisions, one for the assignment by the Board of Probation and Parole of one or more probation officers to the court upon the court's request and the other for an investigation before execution of sentence and at the court's request by the Board of Probation and Parole of any person convicted of any crime or offense and a report to the court pursuant thereto.

It is obvious that this statute provides for an investigation by the parole officer pursuant only to a request by the court.

We shall now consider the provisions of Rule 27.07 of the Rules of Criminal Procedure for the courts of Missouri quoted in your letter above. This rule provides in substance that in every instance unless otherwise directed by the court the probation officer shall make a presentence investigation and report same to the court.

It is obvious from a comparison of the provisions of Section 549.270 RSMo 1949, with the provisions of said Rule 27.07, that the rule provides for the performance of duties by the parole officer which exceed the duties set forth by said Section 549.270. We desire to point out however that while the duties of the parole officer are more extensive under rule than under the statute the duties provided for by the rule are not inconsistent with the duties required by the statute. We shall then consider the question as to whether the Supreme Court rule can create duties to be performed by the parole officer which duties although they are not inconsistent with the duties provided by the statute are nevertheless more extensive than these duties.

Article V, Section 5 of the Constitution of Missouri gives to the Supreme Court of Missouri the power to establish rules of practice and procedure for all courts. Said Section 5, Article V of the Constitution reads as follows:

> "Rules of Practice and Procedure--Duty of Supreme Court--Power of Legislature.--The supreme court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended by a law limited to the purpose."

With the foregoing provision of the Constitution of Missouri in mind we are of the opinion that the Supreme Court has the power to promulgate rules of practice and procedure for the courts of Missouri. That being true we are of the further opinion that the provisions in Rule 27.07, supra, to the effect that: "* * *, such probation officer shall, unless otherwise directed by the court, make a presentence investigation and report to the court before the imposition of sentence or the granting of probation", amounts to a provision, that in all cases the court shall have a presentence investigation and report by the parole officer unless the court specifically directs otherwise. We are of the opinion that this provision definitely amounts to a rule of practice and procedure in the court or courts involved and, since it does not require the performance of a duty by the parole officer, different from that set forth by Sections 549.270 RSMo 1949, but in effect provides that the court shall, unless it instructs the probation officer to the contrary, have a presentence investigation and report from such officer in each case, it at the same time comes within the purview of Article V, Section 5 of the Constitution of Missouri and does not conflict with the provisions of said Section 549.270 RSMo 1949.

CONCLUSION

We are accordingly of the opinion that the probation officer

Hon. Donald W. Bunker

serving any Circuit or Criminal Court of this State will on January 1, 1953 the effective date of Supreme Court Rule 27.07 be charged with the duty to make a presentence investigation and report to the court before the imposition of sentence or the granting of probation in each case unless otherwise directed by the court.

Respectfully submitted

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
ATTORNEY GENERAL

SMW:A

BOARD OF ELECTION
COMMISSIONERS:

The Board of Election Commissioners in passing upon the sufficiency of initiative petitions acts only in a ministerial capacity.

FILED
14

October 6, 1952

10-6-52

Honorable Paul C. Calcaterra
Chairman
Board of Election Commissioners
For The City of St. Louis
208 South 12th Boulevard
St. Louis, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads as follows:

> "Find enclosed petition which has been circulated here. Among such circulated, a husband and wife as a team obtained signatures filling one hundred and fifty petitions. Before having same notarized they divided between themselves these petitions about equally, each signing as affiant his or her portion without considering or regarding the question as to whether he or she actually witnessed the signing of the petitioners whose names appeared before affiant's signature.
>
> "The Election Board questioned this couple; the husband admitted the above procedure and under oath stated that he could not say for sure that the signatures which he in his affidavit as affiant certified to having been written in his presence. This, of course, made his affidavit false.
>
> "In view of the above, our Board questions our right to certify the petitions to the Board of Aldermen here."

The power to enact ordinances through the instrumentality of an initiative petition and the vote of the people are reserved to the people of St. Louis by Article V of the City Charter. The provisions therein contained have been held not to be violative of the constitution or laws of this state. Pitman v. Drabelee, 267 Mo. 78.

Section 3 of Article V of the Charter provides that initiative petitions shall be governed by, and proceedings shall be had thereon in accordance with the provisions of Section 3 and 5 of Article III.

Said section is as follows:

> "Sec. 3. Each such petition and the papers comprising same shall be governed by, and proceedings shall be had thereon in accordance with, the provisions of Section 3 and 5 of Article III concerning the Recall, but construing said sections with reference to the petition and the sufficiency thereof required by this article."

Sections 3 and 5 of Article III provide as follows:

> "Sec. 3. The signatures need not all be appended to one paper, but all papers comprising the petition shall be uniform in character and shall each be verified by affidavit stating that each signature thereto was made in affiant's presence by, as affiant verily believes, the person whose name it purports to be. Each signer shall state, opposite his signature, his residence address. Any person shall be deemed a registered voter whose name is unerased on the registration books.
>
> * * * * * * * * * * * * * * *
>
> "Sec. 5. All papers comprising the petition shall be assembled by the petitioners and filed with the Board of Election Commissioners as one instrument, and within ten days thereafter said Board shall find and certify as to the sufficiency of the petition, stating the number of registered voters signing. If the petition is certified to be insufficiently signed, supplemental papers conforming to the requirements for the originals may be filed within twenty days thereafter, and said Board, within ten days after such supplements are filed, shall find and certify

> as to the sufficiency of the petition, so supplemented. If found still insufficiently signed, no further supplement shall be allowed, but a new petition may be filed."

Since there would appear to be some duplicity, although not conflicting, between Section 5 of Article III, and Section 4 of Article V, insofar as they pertain to your question, we will here set out that portion of Article V in order that they may hereafter be considered together.

> "If the Board of Election Commissioners find that the petition with supplements, if any, is sufficient, it shall forthwith certify that fact, together with a copy of the petition, omitting signatures, to the Board of Aldermen."

Section 3 of Article III specifies the form and contents of an initiative petition. It (each paper) must be verified by affidavit stating that each signature thereto was made in the affiant's presence and that affiant believes that the signatures are the signatures of the persons whose name it purports to be. Each petition must contain the address of the signer opposite his name and all papers comprising the petition shall be uniform in character. Section 2 of Article V specifies the number of signatures required.

Section 5 of Article III provides that the petition shall be filed with the Board of Election Commissioners and they shall thereafter find and certify as to the sufficiency of the petitions. Section 4 of Article V, supra, contains a like provision that the board shall find and certify the sufficiency to the Board of Aldermen. We are unable to find any other provisions in regard to the authority of the Board of Election Commissioners to pass on the sufficiency of the petitions other than that if they find the petition lacking in the requisite number of signatures that may allow the filing of additional papers. Section 5, Article III.

Under the foregoing, we are of the opinion that the Board of Election Commissioners is possessed of no judicial or quasi-judicial authority to inquire into the legal sufficiency of the petition but acts only in a ministerial capacity in passing upon such sufficiency. The provisions of the Charter setting forth the duties of the Election Commissioners and directing what they shall, or shall not do are express positive and mandatory and permit them to make no judicial investigation of the truth or falsity of any facts certified to. The Board of Election Commissioners in passing upon a petition, look to the petition alone and are governed exclusively by what appears upon the face thereof. This rule is stated in 59 C.J., Sec. 278, page 706, as follows:

> "Duty of secretary of state to file a petition received from the proper official or person properly prepared, and when all the statutory requirements have been fulfilled, is mandatory. His action must be based upon the face of the petition as it is received in his office, and when a petition is presented complying substantially with statutory requirements, he is not permitted to make inquiries regarding the genuineness of the petition, or as to the truth or falsity of the certification, but he must file it and leave to the courts the determination of questions of latent fraud or hermetic illegality. * * *"

In the case of State ex rel. v. Carter, 257 Mo. 52, the Supreme Court of Missouri in passing upon a similar question in regard to referendum petitions filed with the secretary of state under laws substantially the same as the Charter provisions here considered said:

> "For example, in the latter State, touching a referendum petition duties are enjoined upon the Secretary which involve, it is said, 'the power to receive protests against the sufficiency of the petitions, and to hear evidence and argument in support thereof, and to determine the sufficiency of the petitions involve the power to find facts and require the exercise of judicial or quasi-judicial powers.' (Norris v. Cross, 25 Okla. l.c. 312.) We have no such provision in our statute. The duties of the Secretary of State as to filing a referendum petition and dealing therewith are with us purely ministerial. (Sec. 6748-6754, R.S. 1909.)
>
> * * * * * * * * * * * * * * *
>
> "We are not saying that the Secretary of State must file a referendum petition upon which either there is not enough congressional districts represented by the signers thereon, or not enough signers from such, or any one of such districts. But where prima facie all of these facts appear, he must file the petition as presented to him and leave to the courts the determination of questions of latent fraud, forgery and hermetic illegality; * * *."

We believe that the foregoing cited text and case authority is here controlling and if said petitions are regular in form, contain

Honorable Paul C. Calcaterra

the required number of signatures and affidavits in compliance with Section 3, Article III, that the Board acts in a ministerial capacity and must certify their sufficiency to the Board of Aldermen.

CONCLUSION

Therefore, it is the opinion of this office that the Board of Election Commissioners of the City of St. Louis in passing upon the sufficiency of initiative petitions acts in a ministerial capacity only and possesses no judicial or quasi-judicial authority to determine questions of latent fraud, forgery or hermetic illegality.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

OK

J. E. TAYLOR
Attorney General

DDG:hr

ELECTIONS: County court not required to furnish permanent voting places within county
COUNTIES: for conducting elections.

FILED
15

January 21, 1952

3-10-52

Honorable John R. Caslavka
Prosecuting Attorney
Dade County
Greenfield, Missouri

Dear Sir:

Your letter at hand requesting to be advised whether or not the county court in a county under township organization is compelled by law to furnish a voting place for the various townships. Thus your letter reads as follows:

> "Will you please advise me whether the County Court, in a county under township organization, is compelled by law to furnish a voting place for the various townships.
>
> "Dade County school districts have recently been reorganized and the various districts are now taking steps to dispose of the country schools which leaves the various townships without places to vote and hold community meetings."

In reading your letter it appears that heretofore when elections were held within your county the schoolhouses located within the various school districts have been used as polling places. Inasmuch as under the circumstances which now prevail steps are being taken to dispose of the various country schools which have been used as polling places during elections, we interpret your request to inquire whether or not the county court is compelled by law to furnish other permanent polling places within the various townships.

In connection with the conducting of elections within the various counties of the state, Section 111.220, RSMo 1949, provides as follows:

> "The county courts of the several counties in this state shall have power to divide any township in their respective counties into two or more election districts, or to establish two or more election precincts in any township, and to alter such election districts and precincts, from time to time, as the convenience of the inhabitants may require."

Section 111.240, RSMo 1949, relating to the place of holding elections, provides:

> "The place of holding the elections shall be designated, and the judges and clerks of election appointed in such districts or for such election precincts, and the elections therein shall be conducted, in all respects, in the same manner as is herein provided by law for the townships."

Section 111.380, RSMo 1949, further provides:

> "If the court fail to designate the place of holding the election or to appoint judges, or the judges appointed fail to act, it shall be the duty of the sheriff to fix the place, and the voters, when assembled, may appoint the judges."

In reading the above-quoted sections we construe them to mean that the duty of designating the places of holding elections, or the polling places, is initially imposed on the county courts of the several counties.

Further provision is made for designating the places of holding elections where the county court fails to act.

While the statutes may require the county court in the various counties to designate the places of holding elections, we do not believe that they authorize county courts to erect or maintain permanent polling places within the county.

In the case of State ex rel. Mercer County v. Gordon, 242 Mo. 615, 147 S.W. 795, the court said the following at Mo. l.c. 623:

Honorable John R. Caslavka

> "There is no law under which either counties or cities may erect or maintain permanent polling places. Neither are such municipalities provided with funds to purchase property in which to conduct public elections; therefore, the election machinery must be exercised at such places as their officers are able to rent or otherwise acquire the use of. * * *"

It would therefore seem that the county court is not compelled by law to acquire or furnish permanent voting places for the holding of elections within the county.

Needless to say, if the school buildings wherein the polling places have heretofore been held are disposed of, other polling places would have to be designated by the county court for the holding of future elections.

CONCLUSION

It is therefore the opinion of this department that the county court is not required by law to furnish permanent voting places for the various townships within the county for the purpose of conducting elections.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

RFT:ml

APPROVED:

J. E. TAYLOR
Attorney General

OPERATOR AND CHAUFFEUR'S LICENSE MAY BE REVOKED BY MAGISTRATE COURTS:

Operator or chauffeur's license to operate motor vehicle within state may be revoked by magistrate court under Sec. 302.225(4) of Senate Committee Substitute for House Bills 22, 49, 56 and 114, for causes provided in act.

FILED
15

February 15, 1952

2-16-52

Honorable Charles B. Cash
Judge of Magistrate Court
415 E. 12th Street
Kansas City, Missouri

Dear Sir:

Your recent request for a legal opinion of this department has been received and reads as follows:

> "An opinion is requested by this office as to the authority of a Magistrate to revoke Missouri Drivers License under the New Motor Vehicle Drivers License Law."

The 66th General Assembly passed amended Senate Committee Substitute for House Committee Substitute for House Bills No. 22, 49, 56 and 114, which became effective on January 1, 1952, and has been referred to as the new driver's license law of Missouri, and we assume that it is the one to which you refer in your letter.

Paragraph 4, of Section 302.225, of said act, relates to the power of the various circuit and magistrate courts of the state to suspend and revoke the license of any operator or chauffeur to operate a motor vehicle within this state, for causes provided in said act. Said section reads as follows:

> "The magistrate courts of each county and the circuit courts of the various counties of this state shall have power to suspend for the causes herein provided

for a period not to exceed one year the license of any operator or chauffeur to operate a motor vehicle within the entire state, and any circuit court or magistrate court may revoke for the causes herein provided the license of any such operator or chauffeur to operate a motor vehicle within this state, whether the case is on appeal or has originated in such court."

From the provisions of this section it is readily seen that operator's and chauffeur's license may be revoked for the causes enumerated in the act, by a magistrate court, therefore, our answer to your inquiry is that a magistrate court has been granted this power.

CONCLUSION

It is therefore, the opinion of this department that a magistrate court has the power to revoke an operator's or chauffeur's license to operate a motor vehicle within this state, under the provisions of Section 302.225, Subsection 4, of amended Senate Committee Substitute for House Committee Substitute for House Bills No. 22, 49, 56 and 114, of the 66th General Assembly of Missouri, for causes enumerated in said act, which act became effective on January 1, 1952.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PNC:hr

MOTOR VEHICLES: Corporation which is owner and operator of motor vehicle may be prosecuted for
HIGHWAYS: an overweight vehicle.

FILED
#15

May 16, 1952

5-16-52

Honorable John M. Cave
Prosecuting Attorney
Callaway County
Fulton, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

> "Your opinion is requested on the following set of facts:
>
> "X Transportation Company, a corporation, employs a driver, Y, who actually operates a motor vehicle upon the highways of this state. Driver Y does not control either the quantity or the manner of loading of the vehicle belonging to X Co. Upon being weighed, the truck is found to be overloaded on an axle or group of axles under the weight regulations of 304.180, RSMo 1949. Under the provisions of Section 304.240, RSMo 1949, may I, as Prosecuting Attorney, file an information against X Trucking Co. for violation of said restrictions, or am I compelled to file the information only against driver Y?"

As stated in your request, Section 304.180, RSMo 1949, provides for certain maximum gross weight of motor-drawn or propelled vehicles operating on the highways of this state. Section 304.240, RSMo 1949, provides as follows:

> "Any person, firm, corporation, partnership or association violating any of the provisions of sections 304.170 to 304.240, shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punished by a

> fine of not less than five dollars nor more than five hundred dollars or by imprisonment in a county jail for a term of not exceeding twelve months, or by both such fine and imprisonment."
> (Emphasis ours.)

The above section is plain and unambiguous in providing that a corporation may be prosecuted for operating a motor vehicle over the highways of this state the gross weight of which is in excess of the statutory maximum. It is well settled in this state that a corporation may be held liable for the criminal acts of its agents and employees. As the Supreme Court of Missouri, en Banc, said in the case of State ex inf. McKittrick v. American Ins. Co., 346 Mo. 269, 140 S.W. (2d) 36, l.c. 40:

> "Conduct of officers and agents of a corporation, which is criminal under the laws of the State, is both a violation of the criminal law by the individual (and in some instances also by the corporation), for which there may be prosecution by criminal information or indictment * * *"

This is in accord with the general rule as stated in 19 C.J.S., page 1075, as follows:

> "A corporation may be held criminally responsible for acts committed by its agents, provided such acts were committed within the scope of the agents' authority or course of their employment. * * *"

To the same effect is 13 Am. Jur., page 1058. See also State v. Belle Spring Creamery Co., 83 Kan. 389, 111 P. 474, in which a corporation was prosecuted for violation of a weight statute.

In view of the above it will be seen that a corporation which owns and operates a truck over the highways of this state, the gross weight of which is in excess of the statutory maximum, may be prosecuted under Section 304.240, RSMo 1949. A prosecution of the corporation only is especially proper when the driver of the vehicle did not have control or knowledge of the quantity or the manner of the loading of the vehicle which is found to be overweight.

Honorable John M. Cave

CONCLUSION

It is therefore the opinion of this department that a corporation which owns and operates a motor vehicle over the highways of this state may be prosecuted under Section 304.240, RSMo 1949, for a misdemeanor when the gross weight of said vehicle is in excess of the maximum weight prescribed by Section 304.180, RSMo 1949.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AMO'K:ml

CRIMINAL LAW: BOARD OF PRISONERS; WHEN THIRD OR FOURTH CLASS COUNTY NOT LIABLE FOR:

One confined in county jail of third or fourth class county for twenty hours for alleged violation of city ordinance without warrant, process or formal charge against him, is not a prisoner within meaning of Sec. 221.090 RSMo 1949; county not liable for person's board bill to sheriff, since alleged violation of city ordinance is not crime, and person is not confined for violation of any criminal laws of Missouri.

FILED
15

September 4, 1952

9-5-52

Honorable John R. Caslavka
Prosecuting Attorney of
Dade County
Greenfield, Missouri

Dear Sir:

Your recent request for a legal opinion of this department has been received and reads as follows:

> "Section 221.090 revised statute of Missouri 1949 compells the sheriff among other things to furnish wholesome food to each prisoner confined in the County Jail.
>
> "This section further commands him to submit to the County Court at the end of each month a statement of the actual cost incurred by him in the boarding of these prisoners and commands the Court to draw a warrant on the County Treasurer payable to the Sheriff for his actual and necessary costs.
>
> "A question has arisen in this County concerning the difinition of the word 'prisoner'.
>
> 1. Is a man who is confined in the County jail by the sheriff for causing a nuisance on the streets or appearing intoxicated on a public street in violation of a municipal ordinance or who disturbs someones peace and is confined by the sheriff for the twenty (20) hour period

and on whom no affidavit is executed, information prepared and filed or warrant issued a prisoner within the meaning of the hereinabove numbered section so as to make the County liable for his board bill."

We understand the inquiry to be whether one confined in the county jail by the sheriff for an alleged violation of a city ordinance for a period of twenty four hours, without any formal charge ever having been filed against such person for having violated a particular city ordinance, is a prisoner within the meaning of Section 221.090 RSMo 1949, so as to render the county liable for his board bill.

Section 221.090 RSMo 1949, provides the method of payment to the sheriff by the county of the amount of the board due the sheriff for keeping each prisoner in the county jail in third and fourth class counties, and reads as follows:

"1. In each county of the third or fourth class, the sheriff shall furnish wholesome food to each prisoner confined in the county jail. At the end of each month, he shall submit to the county court a statement supported by his affidavit, of the actual cost incurred by him in the boarding of prisoners, together with the names of the prisoners, and the number of days each spent in jail. The county court shall audit the statement and draw a warrant on the county treasury payable to the sheriff for the actual and necessary cost.

"2. When the final determination of any criminal prosecution in a county of the third or fourth class shall be such as to render the state liable for costs under existing laws, it shall be the duty of the county clerk to certify to the clerk of the circuit court or court of common pleas in which the case was determined, the amount due the county for boarding any prisoner who was a party in such case. It shall then be the duty of the clerk of the court in which the case was determined to include in the bill of costs against the state, all fees which are properly chargeable to the state for the board of such prisoners."

Paragraph 2, of Section 221.090, supra, specifically provides that upon the final determination of a criminal prosecution in a third or fourth class county in those cases in which the state shall be liable for the court costs, it shall pay to the county the amount expended for board of a prisoner in the county jail who was a party to such

case, and that said amount shall be included in, and constitute a part of the cost bill of such case. Cases of this class would include only felony cases, for which the state became liable for costs.

Section 550.030 RSMo 1949, provides the conditions under which the county shall be liable for the payment of court costs, in misdemeanor cases and reads as follows:

> "When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

Section 556.010 RSMo 1949, defines the term criminal offense, and reads as follows:

> "The terms 'crime', 'offense,' and 'criminal offense,' when used in this or any other statute, shall be construed to mean any offense, as well misdemeanor as felony, for which any punishment by imprisonment or fine, or both, may by law be inflicted."

By this definition, it is noted that all criminal offenses under Missouri statutes fall into either one of two classes, namely, felonies and misdemeanors; with this classification in mind, it is our thought that Section 221.090, supra, relating to the procedure for payment of the board of prisoners in the county jail to the sheriff by the county court can refer only to those prisoners held in custody charged with some criminal offense under the statutes, or in connection with a criminal case, in which such prisoner is a party.

By the above definition it appears that no reference is made to a city ordinance, and that it does not fall within either classification included in the term, criminal offense. Therefore, it follows that the violation of a city ordinance is not a crime, which has repeatedly been held to be the law in Missouri by the courts in numerous cases. In the case of State v. Mills, 272 Mo. 526, which seems to be a leading case on the subject the court said at l.c. 537:

> "We are of the opinion that neither by our decisions, nor by statute, is a conviction for vagrancy in a city court 'a criminal offense' within the purview of the above quoted statute. For while the procedure, or some of it, in a prosecution for the

violation of a town or city ordinance is criminal in form, that is, it follows the forms of the criminal procedure, we have nevertheless uniformly held that it is but a civil action to recover a debt or penalty due the city for the infraction of its ordinances. (St. Louis v. Tielkemeyer, 226 Mo. l.c. 141; State v. Muir, 164 Mo. 610.)

"In the Tielkemeyer case, supra, it was said by VALLIANT, J.,:

"'In City of Kansas v. Clark, 68 Mo. 588, it was held that a prosecution under a city ordinance for keeping a gambling table contrary to the ordinance was not a prosecution for a crime, but a civil suit to recover a penalty, the court saying: "Nor do we regard the violation of the ordinance under consideration as a crime, since a crime . . . is an act committed in violation of a public law" (4 Black. Com., 5); a law co-extensive with the boundaries of the State which enacts it. Such a definition is obviously inapplicable to a mere local law or ordinance, passed in pursuance of, and in subordination to, the general or public law, for the promotion and preservation of peace and good order in a particular locality, and enforced by the collection of a pecuniary penalty." That language was quoted and followed as the correct rule of law in State v. Muir, 164 Mo. 610, in which it was held that a conviction under a city ordinance against gaming was not a bar to a subsequent prosecution for the same act under the State statute; in that case the court said that the prosecution under the city ordinance was a civil action, and quoted Cooley's Const. Lim. (6 Ed.), p. 239, to sustain the doctrine. In Canton v. McDaniel, 188 Mo. 207, l.c. 228, the converse of the proposition was also held, that is, that an acquittal in a prosecution under the State statute was not a bar to a prosecution to recover the penalty prescribed in a city ordinance for the same act. In City of St. Louis v. DeLassus, 205 Mo. 578, it was again said that a prosecution under a city ordinance to recover a penalty was a civil action, and that an ordinance was not invalid because it forbade and imposed a penalty for an act which the State statute declared to be a crime and for which it prescribed a penalty, and also that the ordinance was not invalid because it imposed a higher pecuniary penalty for the offense than that imposed by the statute."

Again in the case of Meredith v. Whillock, 173 Mo. App. 542, the court held that the violation of a city ordinance was not a criminal offense, or that the ordinance was not even law. At. l.c. 553, the court said:

> "Section 4926, Revised Statutes 1909, is as follows:
>
> "'Sec. 4926. "Criminal offense." - The terms "crime," "offense," and "criminal offense," when used in this or any other statute, shall be construed to mean any offense, as well misdemeanor as felony, for which any punishment by imprisonment or fine, or both, may by law be inflicted.'"
>
> "That a city ordinance is not law is obvious. 'An ordinance is defined to be a "rule or regulation adopted by a municipal corporation." (And. Law Dict. p. 738.) The terms "by-laws," "ordinances," and municipal regulations" have substantially the same meaning, and are defined to be "the laws of the corporate district, made by the authorized body, in distinction from the general laws of the State." They are local regulations, for the government of the inhabitants of the particular place. (State v. Lee, 29 Minn. 451-453, 13 N.W. 913, and cases cited.) In the case of Baldwin v. City of Philadelphia, 99 Pa. St. 170, the court say that an ordinance of the councils of a municipality, though binding upon the community affected by it, is not a 'law' in the legal sense. It is not prescribed by the supreme power of the State, from which alone a law can emanate, and it is not of general authority throughout the commonwealth.' (Mayor, etc., of Rutherford v. Swink, 35 S.W. (Tenn.) 554, 555. See, also McInerney v. City of Denver, 29 Pac. (Colo.) l.c. 519; City of Greeley v. Hamman, 20 Pac. 1; State v. Fourcade, 40 Am. St. Rep. (La.) 249.)"

It seems that the detention of the person by the sheriff in above statement of facts was made under authority of Section 544.170 RSMo 1949, which reads as follows:

> "All persons arrested and confined in any jail, calaboose or other place of confinement by any peace officer, without warrant or other process, for any alleged breach of the peace or other criminal offense, or on suspicion thereof, shall be discharged from said custody within twenty hours from the time of such arrest, unless

> they shall be charged with a criminal offense by the oath of some credible person, and be held by warrant to answer to such offense, and every such person shall while so confined, be permitted at all reasonable hours during the day to consult with counsel or other persons in his behalf; and any person or officer who shall violate the provisions of this section, by refusing to release any person who shall be entitled to such release, or by refusing to permit him to see and consult with counsel or other persons, or who shall transfer any such prisoner to the custody or control of another, or to another place, or prefer against such person a false charge, with intent to avoid the provisions of this section, shall be deemed guilty of a misdemeanor."

It is noted that this section authorizes the detention of such persons (1) for any alleged breach of the peace; (2) or other criminal offense; (3) or on suspicion thereof, and that no peace officer can detain a person for twenty hours under this section for any other reasons than those specified.

One confined in the county jail by the sheriff for twenty hours for an alleged violation of a city ordinance or ordinances, under the circumstances mentioned in the opinion request is not confined for an alleged breach of the peace, or other criminal offense or for investigation in connection therewith, under the criminal laws of Missouri.

We have pointed out above that the violation of a city ordinance is not a criminal offense or a violation of the criminal laws of Missouri.

The person confined in jail, and referred to above, is not legally confined under authority of Section 544.170; that section having no application to the imprisonment of persons for the alleged violation of city ordinances.

Since the person so confined, is not charged with a criminal offense; either a felony or misdemeanor under the Missouri statutes, or has not been convicted of any such offense; he is not a prisoner within the meaning of Section 221.090, supra, and under such circumstances the county would not be liable to the sheriff for the board bill of such person confined in the county jail.

CONCLUSION

It is therefore the opinion of this department that when a sheriff of a third or fourth class county confines one in the county jail of

Honorable John R. Caslavka

said county for an alleged violation of a city ordinance, without any formal charge ever having been made, warrant or other process issued and served upon him, and such person was confined in said county jail for a period of twenty hours, such person is not a prisoner within the meaning of Section 221.090 RSMo 1949, so as to render the county liable to the sheriff for the amount of money expended by the sheriff for the board of the person so confined in said county jail.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PNC:hr

MUNICIPALITIES: City of fourth class not required to certify
TAXES: delinquent tax lists to county collector under Sec. 140.670, RSMo 1949, and county clerk not required under Sections 140.060 and 140.070, RSMo 1949, to prepare back tax book for fourth class city.

September 24, 1952

FILED

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FILED
15

Honorable John R. Caslavka
Prosecuting Attorney
Dade County
Greenfield, Missouri

Dear Mr. Caslavka:

The following opinion is rendered in reply to your inquiry reading as follows:

> "A question has arisen in Dade County Missouri concerning the purpose of Back Taxes Books for the entry of delinquent taxes of fourth class cities in this state."
>
> "As I interpret the law, and all of these citations are to the revised statutes of Missouri 1949, Section 140.670 authorizes the collectors of all cities and incorporated towns of this county to return to the County Collector a list of the lands on which taxes are due and unpaid and Section 140.680 gives the power of collection to the County Collector.
>
> "Sections 140.060, 140.070 and 140.090 states that the County Clerk is to file delinquent list in his office and enter them in the Back Taxes Book. The question then arises;
>
> "1. Is the duty of the county in which said city is located to purchase a Back Tax Book for the use of these cities?
>
> "2. If it is the duty of the County Court to purchase this book, can they be compelled to do so?"

In the above quoted request for an opinion you have referred to Sections 140.670 and 140.680, RSMo 1949, as authorizing a city collector in a city of the fourth class in Missouri to return to the county collector a list of lands and lots on which the taxes or special assessments levied by such city remain due and unpaid, so that the county collector may proceed to collect said taxes. In the case of State ex rel. Steed v. Nolte, 138 S.W. (2d) 1016, 345 Mo. 1103, decided by the Supreme Court in 1940, the Court was construing Sections 9970 and 9971, RSMo 1929 (Sections 140.670 and 140.680 RSMo 1949) and Section 6995, RSMo 1929 (Section 94.310 RSMo 1949), and spoke as follows at 345 Mo. l.c. 1107, 1108:

> "Relators contend that not only must the taxes of respondent city be collected by advertisement and sale as outlined in the original Jones-Munger Law, but also that they must be collected by county and not city officers. Relators base this claim on Sections 9970 and 9971, Revised Statutes 1929 (Mo. Stat. Ann., pp. 8012-8013); and on certain sections of the Jones-Munger Law. Section 9970 provides that the collectors of all cities having authority to levy and collect taxes shall annually return to the county collector all unpaid real estate assessments and Section 9971 provides that the county collector shall have power to collect such assessments. These sections were first enacted in 1872 (Laws of 1871-2, page 118) at a time when no city had a lien for, or the power to collect, city taxes. In 1879 and later, as we have already pointed out, various classes of cities were granted a lien for, and the power to collect their own taxes. Notwithstanding this, Sections 9970 and 9971 have been retained in the statutes and Section 9970 was repealed and reenacted in substantially the same form in 1933, the only change being to substitute the words 'first Monday in March' for the words 'first day in May.' (Laws of 1933, p. 450.) The apparent conflict between the statutes, now numbered 6995 and 9970, 9971, respectively, was considered by this court in the case of City of Aurora

> ex rel. v. Lindsay, 146 Mo. 509, 48 S.W. 642, decided in 1898. It was there held that the city collector, not the county collector, was the proper officer to collect taxes due a city of the fourth class. That ruling has not since been departed from; so, when the General Assembly repealed and reenacted Section 9970 in 1933, in the same form, they are presumed to have adopted the construction so placed on the statutes by this court. (State ex inf. Gentry v. Meeker, 317 Mo. 719, 296 S.W. 411.) In other words, said Section 9970, both before and after its reenactment in 1933, was and is applicable only to the limited number of cities above mentioned, which still return their delinquent taxes to county instead of city officers. The expression 'such cities,' appearing in Sections 9949, 9950, and other sections of the Jones-Munger Law and of the Revised Statutes, refers to such cities as from time to time have been granted the power to collect their own taxes, and those sections vest in city officers the same duties as to city taxes as are exercised by county officers as to other taxes. Section 9963c makes this clearer by requiring us to read the word 'city' into the various sections where the word 'county' appears.
>
> "Our conclusions in this case apply only to the collection of city taxes in cities of the fourth class. Other cities are governed by different statutes which may or may not compel a different result."

Under the ruling in State ex rel. Steed v. Nolte, cited, supra, we must conclude that in a city of the fourth class in Missouri, the city collector, not the county collector, is the proper officer to collect taxes due such city. Having this authority to collect its own taxes, a city of the fourth class is not subject to Section 140.670, RSMo 1949, which provides for certification of delinquent land lists to the county collector, and the county clerk has no occasion to make a back tax book for a city of the fourth class. Sections 94.320 and 94.330,

RSMo 1949, particularly applicable to fourth class cities, provide as follows:

> "Section 94.320. Collector to make delinquent lists--board of approve--collection of delinquent taxes.--1. The board of aldermen shall require the collector, at the first meeting of the board in April of each year, or as soon thereafter as may be, to make out, under oath, lists of delinquent taxes remaining due and uncollected for each year, to be known as 'the land and lot delinquent list' and 'the personal delinquent list.'
>
> "2. The board of aldermen, at the meeting at which the delinquent lists are returned or as soon as may be thereafter, shall examine the lists carefully, and if it appear that all property and taxes contained in the lists are properly returned as delinquent, the board shall approve the lists, enter a record thereof in the journal and credit the amount thereof to the account of the city collector.
>
> "3. The board shall return the delinquent lists to the collector, charging him therewith, and he shall proceed to collect the same in the same manner as provided by law for state and county taxes.
>
> "Section 94.330. Collector to report monthly to board.--The city collector shall report to the board of aldermen, at the regular meetings in each month, all taxes collected on the real and personal delinquent lists; and he shall pay the same into the city treasury, and shall receive credit therefor. He shall turn over to his successor in office all uncollected delinquent lists, receiving credit therefor, and his successor shall be charged therewith; provided, that the board of aldermen may declare worthless any and all personal delinquent taxes which they may deem uncollectible."

The two statutes quoted above disclose that no back tax book is furnished to the city collector of a fourth class city by a county clerk, but that only delinquent lists are made by the city collector and from such lists he proceeds to make collections as provided by law.

Honorable John R. Caslavka

CONCLUSION

It is the opinion of this office that Section 140.670, RSMo, 1949, is not applicable to cities of the fourth class and such cities are not required to return delinquent tax lists to county collectors so as to require such delinquent taxes to be extended in the county back tax book to be prepared by the county clerk under the provisions of Sections 140.060 and 140.070, RSMo, 1949.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:lw

MOTOR VEHICLES:
TRAFFIC AND EQUIPMENT
REGULATIONS:
OVERWEIGHT:

Section 304.180, A.L. 1951, H.B. 283, prohibits the operation on the highways of this state of a vehicle having a greater weight than 18,000 pounds on one axle when the wheels attached to said axle are equipped with low pressure tires.

FILED
15

September 30, 1952

10/1/52

Honorable John M. Cave
Prosecuting Attorney
Callaway County
Fulton, Missouri

Dear Sir:

This is in reply to your recent letter requesting an official opinion of this office. Your request is as follows:

> "Your opinion is requested upon the following state of facts: A trailer being drawn upon the highways of this state upon being weighed is found to have a gross weight of 19,140 lbs. on one axle, said axle has dual wheels on each side of the trailer, which dual wheels measure, in each wheel, nine inches between the flanges of the rim. Under the provisions of Section 304.180 RSMo. 1949, is the driver thereof guilty of operating an overloaded vehicle because of a weight greater than 18,000 lbs. on one axle, or is he allowed the greater weight of 21,600 lbs. computed by multiplying the 36 inch of tire width by 600 lbs.?"

Since your request is concerning the interpretation of Section 304.180, A.L. 1951, H.B. 283, we believe it advisable, for the purpose of this opinion, to quote that section. It is as follows:

> "1. No vehicle or combination of vehicles shall be moved or operated on any highway in this state having a greater weight than sixteen thousand pounds on one axle when the wheels

attached to said axle are equipped with high pressure pneumatic, solid rubber or cushioned tires, and no vehicle or combination of vehicles shall be moved or operated on the highways of this state having a greater weight than eighteen thousand pounds on one axle when the wheels attached to said axle are equipped with low pressure tires, and no vehicle shall be moved or operated on the highways of this state having a load of over six hundred pounds per inch width of tire upon any wheel concentrated on the surface of the highway, the width in the case of rubber tires, both solid and pneumatic, to be measured between the flanges of the rim.

"2. An 'axle load' shall be defined as the total load transmitted to the road by all wheels whose centers are included between two parallel transverse vertical planes forty inches apart, extending across the full width of the vehicle.

"3. Subject to the limit upon the weight imposed upon the highway through any one axle, the total gross weight with load imposed upon the highway by any one group of two or more consecutive axles of a vehicle or combination of vehicles shall not exceed the gross weight given for the respective distance between the first and last axle of the total group of axles measured longitudinally to the nearest foot as set forth in the following table:
* * *."

Your request narrows down to the second and third provisos of Section 304.180, supra. We believe that this section definitely limits the gross weight which any one axle bears upon the highway to be 18,000 pounds and that is when the wheels attached to the axle are equipped with low pressure tires. For further clarification of the meaning of the second prohibition of Section 304.180, supra, we refer to paragraph 2 of that

section which describes an axle load. Subsection 3 of Section 304.180, supra, refers to the limit upon the weight imposed upon the highways through any one axle which further distinguishes the second prohibition in the first paragraph.

The purpose of the Legislature seems to be definitely to regulate the weight that vehicles impose upon the highway. By reading the section cited, supra, as a whole, it may be further gleaned from the statute that the intention was to spread the weight over as large a surface of the highway as practicable.

Following the above mentioned policy, it will be noted that each of the three prohibitions of paragraph 1 of Section 304.180, supra, stands by itself and is a separate limitation from each of the others.

In the case of In Re Petition of De Jarnett v. Tickameyer, 40 S.W. (2d) 686, 328 Mo. 153, l.c. 157, the Court stated:

> "* * * All provisions of the statute should be considered in determining the meaning of any particular portion thereof, and effect given to every part of the statute where it is possible to do so. * * *"

Considering Section 304.180, supra, and Section 304.240 of the same House Bill, the latter section providing a penalty for the violation of the former, and other traffic and equipment regulations in Chapter 304, it seems definite that this statute was enacted to prevent damage to the highways of this state by overloaded vehicles.

CONCLUSION

Therefore, it is the opinion of this office that Section 304.180, A.L. 1951, H.B. 283, prohibits the operation on the highways of this state of a vehicle having a greater weight

Honorable John M. Cave

than 18,000 pounds on one axle when the wheels attached to said axle are equipped with low pressure tires.

Respectfully submitted,

JAMES W. FARIS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JWFab

MOTOR VEHICLES:
HIGHWAYS:
COUNTY COURTS:

Section 304.220, RSMo 1949, is constitutional, in allowing county courts to limit maximum weight of motor vehicles on roads other than highways when roads are in soft condition.

FILED
15

October 7, 1952

10-14-52

Honorable John M. Cave
Prosecuting Attorney
Callaway County
Fulton, Missouri

Dear Sir:

This office is in receipt of an opinion request from you, as follows:

> "Your opinion is requested on the following question: May the County Court pursuant to authority contained in Section 304.220, RSMo 1949, limit the maximum weight of vehicles using improved roads or highways, other than State Highways, when the roads are in soft condition; or is such action invalid as a delegation of legislative authority or a violation of Section 16 of Article IV of the Constitution of 1945, or invalid for any other reason?"

Section 304.220, RSMo 1949, provides for the limitation by official bodies having charge of highways other than state highways of maximum weight in order to preserve the road.

In the case of Ashland Transfer Co. v. State Tax Commission, 274 Ky. 144, 56 S.W. (2d) 691, 87 A.L.R. 534, l.c. 541, 542, the Court stated:

> "* * * The same question was made in the case of Union Bridge Company v. United States, 204 U.S. 365, 27 S. Ct. 367, 373, 51 L. ed. 523, in which the universal rule is recognized that neither Congress nor a state Legislature may delegate legislative powers to an

> administrative or executive officer. But at the same time it was most emphatically asserted that it is competent for a legislative body in framing a statute to delegate to such executive or administrative officers regulatory powers by which they are authorized and empowered to find facts and determine conditions to which the law may or may not apply. In that (last cited) case Judge Harlan, speaking for the court, stated the rule as taken from Locke's Appeal, 72 Pa. 491, 13 Am. Rep. 716, thus: '"To assert that a law is less than a law because it is made to depend on a future event or act is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know." The proper distinction, the court said, was this: "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation."'"

Not only is this the Kentucky rule but in Sproles v. Binford, 286 U.S. 374, 76 L. Ed. 1167, l.c. 1184, the Court stated:

> "Appellants also urge that section 2 is invalid as a delegation of power to the State Highway Department in violation of section 28, Article I. of the Texas Constitution and of the 14th Amendment of the Federal Constitution. We think that the objection is untenable. We agree with the District Court that the authority

> given to the department is not to suspend the law, but is of a factfinding and administrative nature, and hence is lawfully conferred. See Trimmer v. Carlton, 116 Tex. 591, 296 S.W. 1070. Under Section 2, special permits may be granted by the department, for limited periods, for the transportation 'of such overweight or oversize or overlength commodities' when it is found that they 'cannot be reasonably dismantled,' or for the operation of superheavy and oversize equipment for the transportation of commodities ascertained to be of that character. This authorization, in our judgment, does not involve an unconstitutional delegation of legislative power. * * *"

In Ex Parte Williams, 139 S.W. (2d) 485, 345 Mo. 1121, Certiorari Denied, Williams v. Goldman, 61 S. Ct. 42, 311 U.S. 675, 85 L. Ed. 434, l.c. S.W. 491, the Court stated:

> "(12) 'A legislative body cannot delegate its authority, but alone must exercise its legislative functions. 12 C.J. 839; 6 R.C.L. 175. It may empower certain officers, boards, and commissions to carry out in detail the legislative purposes and promulgate rules by which to put in force legislative regulations. It may provide a regulation in general terms, and may define certain areas within which certain regulations may be imposed, and it may empower a board or a council to ascertain the facts as to whether an individual or property affected come within the general regulation or within the designated area.' Cavanaugh v. Gerk, 313 Mo. 375, 280 S.W. 51, loc. cit. 52."

These above cited cases all show that the Legislature may delegate authority to enforce the law made by it to administrative bodies which it has created to determine facts upon which the action of the law depends. The statute under consideration is considered not to be a legislative authority to suspend the law or make a new law but in reality, to enforce the law as the Legislature has made it; in this case,

the road condition at the time of the promulgation of the county court's order. It is obvious that the Legislature cannot determine weather conditions in advance for the period covered by a statute which it enacts. It must leave the determination of road conditions to some other authority and we feel that this is what has been done by the enactment of Section 304.220, supra.

CONCLUSION

It is therefore the opinion of this office that Section 304.220, RSMo 1949, is not an invalid delegation of legislative authority but is a delegation of regulatory powers within the authorization of the Legislature under the Constitution of Missouri.

Respectfully submitted,

JAMES W. FARIS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JWFab

MOTOR VEHICLES: For the purposes of determining the gross weight of a vehicle or combination of vehicles under Section 304.180, A.L. 1951, H.B. 283, the front or steering axle is to be considered as one of a group of two or more consecutive axles.

AXLE LOADS:

FILED
15

October 27, 1952

10-27-52

Honorable John M. Cave
Prosecuting Attorney
Callaway County
Fulton, Missouri

Dear Sir:

This office is in receipt of an opinion request from you as follows:

> "The opinion of your office is requested in regard to the interpretation of Section 304.180 RSMo 1949 as amended by CCS Am SCSHB 283 Laws of 1951.
>
> "For purposes of determining whether a motor vehicle or combination of vehicles exceeds the gross weight set out in Section 304.180.3, is the front, or steering axle considered one of a 'group of two or more consecutive axles'?"

Since your request is concerning the interpretation of Section 304.180 A.L. 1951, House Bill No. 283, we believe that it is advisable for the purpose of this opinion to quote that section. It is with weight table only partially quoted as follows:

> "Regulations as to weight--axle load defined.--1. No vehicle or combination of vehicles shall be moved or operated on any highway in this state having a greater weight than sixteen thousand pounds on one axle when the wheels attached to said axle are equipped with high pressure pneumatic, solid rubber or cushioned tires, and no vehicle or

combination of vehicles shall be moved or operated on the highways of this state having a greater weight than eighteen thousand pounds on one axle when the wheels attached to said axle are equipped with low pressure tires, and no vehicle shall be moved or operated on the highways of this state having a load of over six hundred pounds per inch width of tire upon any wheel concentrated on the surface of the highway, the width in the case of rubber tires, both solid and pneumatic, to be measured between the flanges of the rim.

"2. An 'axle load' shall be defined as the total load transmitted to the road by all wheels whose centers are included between two parallel transverse vertical planes forty inches apart, extending across the full width of the vehicle.

"3. Subject to the limit upon the weight imposed upon the highway through any one axle, the total gross weight with load imposed upon the highway by any one group of two or more consecutive axles of a vehicle or combination of vehicles shall not exceed the gross weight given for the respective distance between the first and last axle of the total group of axles measured longitudinally to the nearest foot as set forth in the following table:

"Distance in feet between first and last axles of group	Maximum load in pounds on group of axles
4	32,000
5	32,000
* * *(down to)* * *	
37.....	58,420
38.....	59,220
39 or over.....	60,010."

(Balance of weight table omitted by us.)

Honorable John M. Cave

It will be noted that in the third paragraph of the above quoted section to which you refer as 304.180.3, the first reference of said section is to matter contained in paragraph one of the section. The reference is to the limitation of the total gross weight imposed on the highway by any one axle. That weight is fixed at 18,000 pounds. The allowable maximum weight which is 60,010 pounds requires a vehicle to have a distance of 39 feet between the first and last axle or groups of axles. Section 304.170, RSMo 1949, limits the greatest allowable length of any combination of vehicles to be operated on the highway to 45 feet.

It will also be noted that the statute refers to the total group of axles in that it says "any one group of two or more consecutive axles of a vehicle shall not exceed the gross weight given for the respective distances between the first and last axle of the total group of axles." This would necessarily include the front or steering axle as the first axle of the group and the hindmost axle of the vehicle as the last axle.

Our Supreme Court said in regard to the construction of a suit in St. Louis Amusement Co. vs. St. Louis County, 147 S.W. (2d) 667, l.c. 669:

> "* * * And where the language of a statute is plain and unambiguous it may not be construed. It must be given effect as written."

CONCLUSION

It is therefore the opinion of this office that for the purposes of determining the gross weight of a vehicle or combination of vehicles under Section 304.180, A.L. 1951, House Bill No. 283, the front or steering axle is to be considered as one of a group of two or more consecutive axles.

Respectfully submitted,

JAMES W. FARIS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

MAGISTRATE COURTS:
JURIES:

A sheriff is allowed the sum of $2.00 for issuing a "special venire facias" for a jury in a magistrate court. A magistrate judge is under no duty to summon a regular jury panel.

FILED
18

April 21, 1952

4/22/52

Honorable Joe Collins
Prosecuting Attorney
Cedar County
Stockton, Missouri

Dear Sir:

Some time ago you wrote to this department requesting an official opinion. You thus stated your request:

> "I should like to have your opinion as to what a sheriff is allowed for summoning a jury in Magistrate court in fourth class counties.
>
> "First: For summoning a jury of twelve men.
>
> "Second: For summoning a jury of more than twelve men."

Shortly thereafter, we wrote to you asking whether by "a jury of twelve men" you did not mean a jury panel of twelve men from which a six-man jury would be selected. To this, you wrote the following letter:

> "As suggested in your letter of October 26, I am writing you again setting forth the information desired.
>
> "It has been the custom in this county to not summon a jury panel in magistrate court and when a jury is needed it has been the custom for the parties to the suit to ask the sheriff to summon a jury of 12 men and it has been the practice and custom of the party losing the suit to pay the sheriff a fee of 50¢ for each juror summoned or a total fee of $6.00.

> "The last civil suit tried before Magistrate Judge Campbell resulted in a verdict against plaintiff. Plaintiff desires to pay the costs but wants to know how much he should pay the sheriff for summoning the jury of 12 men, and Magistrate Judge Campbell asked me to write for your opinion on the matter.
>
> "Judge Campbell would also like to know whether or not he should have the sheriff summon a regular jury panel and if so, how often he should have one summoned and what fees the sheriff would be entitled to for summoning same."

Your second letter still does not answer our question but we must assume that this is your meaning since in the second question of your first letter you speak of a "jury of more than twelve men," which could, of course, refer only to a jury panel.

Your first question then becomes: "What is a sheriff allowed for summoning a jury panel of twelve men for a magistrate court jury?" And your second question becomes: "What is a sheriff allowed for summoning a magistrate court jury panel of more than twelve men?"

At this point we feel that we should clarify a matter which has a very important bearing on your questions. In the fourth paragraph of your second letter to us, you state that "when a jury is needed in magistrate court in your county, it has been the custom for the parties to the suit to ask the sheriff to summon a jury of twelve men ....." There is no provision in the law which sanctions a procedure of this sort. The correct procedure is set forth in Section 499.150, RSMo 1949, which states:

> "In any county now or hereafter having a population of less than seventy thousand inhabitants, the magistrate or magistrates may, by order of record, direct that jurors be selected by issuing a summons to the sheriff or other officer ordering him to summons the appropriate number of jurors. In such event, each juror summoned shall receive one dollar per day for every day

> he may actually serve as such, and five cents for every mile he may necessarily travel going from his place of residence to the place where the trial is held, and such fees and expenses shall be taxed as costs in the particular case tried. In the event that the magistrate or magistrates make the order herein provided for, the order shall have the effect of suspending the provisions of sections 499.010 to 499.160 in the selection of the general county panel and the selection of jurors thereunder; and such provisions shall remain suspended until such order is rescinded."

You will observe from the above section that "the magistrate or magistrates may, by order of record, ... direct . . . . . the sheriff . . . . . to summons the appropriate number of jurors." If, therefore, the magistrate does not make the order and the sheriff summons the jurors at the request of the parties to the suit, the whole proceeding is illegal and the sheriff would not be entitled to any compensation.

If, however, the procedure followed is that outlined in Section 499.150, supra, which is that the magistrate, by order of record, directs the sheriff to summon the appropriate number of jurors, then the opinion written by this department on September 3, 1947, to Honorable O. A. Kamp, Judge of the Magistrate Court of Montgomery County, would apply. A copy of this opinion is enclosed. You will note that the Kamp opinion holds that such a jury as you contemplate would be a "special venire facias" for the summoning of which the sheriff would be entitled to a fee of $2.00. This would be true whether the jury summoned was a twelve-man jury panel or more. Regardless of number, it would be a "special venire facias" for which the law of Missouri (now Section 57.280, RSMo 1949) allows the sheriff $2.00.

In your second letter to us, you state: "Judge Campbell would also like to know whether or not he should have the sheriff summon a regular jury panel and if so, how often he should have one summoned and what fees the sheriff would be entitled to for summoning same."

We assume that by "regular jury panel", you mean a panel to be used in more than one case, or a "standing jury panel."

Honorable Joe Collins

No duty is imposed upon a magistrate judge to summon a regular jury panel. Section 499.010, RSMo 1949, does impose such a duty upon the board of jury commissioners. That section reads:

> "At least once each year on or before the first day of May, the board of jury commissioners shall select names of not less than four hundred persons having all of the qualifications of jurors; and in selecting such names the board shall select such number of persons from each township as the population of such townships bears to the population of the entire county. No persons shall be selected who has served on any grand, petit or magistrate jury within one year from the time of making the selection. The names and addresses of the persons selected from each township shall be written on separate slips of paper of the same kind and size and placed in a box with a sliding lid and thoroughly mixed."

This matter is also discussed in the Kamp opinion which is enclosed.

CONCLUSION

It is the opinion of this department that for issuing a "special venire facias" for a jury in magistrate court, a sheriff is allowed the sum of $2.00. It is our further opinion that a magistrate judge is under no duty to summon a regular jury panel.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HPWab

Enclosure.

MOTOR VEHICLE REGISTRATION:
PERSONAL PROPERTY TAX:

Under House Bill No. 211 a person moving into Missouri from another state may demand and obtain from his local collector a statement showing that no taxes on personal property were due for the preceding year. A person moving from one county to another within Missouri must obtain a tax receipt or statement from the collector where he resided at the time assessments were made for the preceding year.

FILED
18

October 20, 1952

10-21-52

Mr. Joe Collins
Prosecuting Attorney
Cedar County
Stockton, Missouri

Dear Mr. Collins:

We have given careful consideration to your request for an opinion, which request is as follows:

> "Under House Bill No. 211 66th General Assembly and under the law may a person who has just recently moved into the state of Missouri from some other state where he was or should have been taxed demand and be entitled to receive from the County Collector of the County in Missouri where he has moved to, a card showing no assessment of personalty so he may obtain a Motor Vehicle Registration tag.
>
> "I would also like to know if a person moving from another County in this state where he was assessed or should have been assessed for taxes may demand of and be entitled to receive from the county collector of the county to which he moved a statement from said collector showing no assessment of personal property so he may obtain a motor vehicle registration tag."

House Bill No. 211, now incorporated as Section 301.025 in the 1951 Supplement to RSMo 1949, is as follows:

> "No state registration license to operate any motor vehicle in this state shall be issued unless the application for license is accompanied by a tax receipt or a statement certified by the county or township collector of the county or township in which the applicant's property was assessed showing that the state and county tangible personal property taxes

> for the preceding year have been paid by the applicant or that no such taxes were due. Every county and township collector shall give each person a tax receipt or a certified statement of tangible personal property taxes paid. Where no such taxes are due each such collector shall, upon request, certify such fact and transmit such statement to the person making the request. The director of revenue shall make necessary rules and regulations for the enforcement of this section, and shall design all necessary forms."

This new law has not been construed by the courts of the state. Its meaning, therefore, must be determined by the rule of reason and an honest effort to ascertain and apply the intent of the Legislature.

The Legislature of this state has no jurisdiction over the assessment or collection of taxes in another state. Our Legislature should have no reason to be concerned with such problems of other states. It is evident, then, that the Missouri Legislature had no thought of making House Bill No. 211 apply in any way to tax receipts or statements in other states.

The clear intent of the Legislature is to require an applicant for a license to operate a motor vehicle to make proof that his tangible personal property taxes in any county in this state for the preceding year have been paid or that no such taxes were due. All applicants must present a tax receipt or statement in support of such proof.

CONCLUSION

It is the opinion of this office that under House Bill No. 211, enacted by the 66th General Assembly, a person who has recently moved into the State of Missouri need not show a tax receipt or statement from a collector in his former state. He may demand and obtain from the collector of the Missouri county or township in which he resides a statement showing that no taxes on personal property were due for the preceding year, and this should enable him to obtain a motor vehicle license.

It is also the opinion of this office that a person who moves from one county to another within the State of Missouri may not demand and obtain from the collector of the county or township into which he has moved a statement showing that no such taxes were due. He must obtain a tax receipt or statement from the collector of the county or township in which he resided at the time assessments were

Mr. Joe Collins

made for the preceding year.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ATHLETIC COMMISSION:) Section 317.020, RSMo 1949: Tax on "gross ceipts" from regulated boxing, sparring and wrestling exhibitions not to be applied to r ceipts obtained by theaters televising such hibitions. Five per cent of the gross amount paid for the right to televise such exhibitions should be collected on the amount paid for the right to televise such exhibitions.

TAXATION:)

FILED
19

January 31, 1952

2-1-52

Honorable Bert Cooper
Director
Dept. of Business and Administration
State Office Building
Jefferson City, Missouri

Dear Mr. Cooper:

The following opinion is rendered in reply to your recent request reading as follows:

"The Division of Athletics in the State Department of Business and Administration is authorized and given the expressed duty by Section 317.020, Revised Statutes 1949 to supervise all boxing and wrestling matches in the state and to issue license and collect fees.

"Among the fees collected is a charge of five percent of the gross gate receipts of every boxing, sparring and wrestling exhibition held in the state. Such funds are paid into the State Treasury and are set aside as a State Athletic Commission fund. Any appropriation made to the Division of Athletics is taken from this fund. The expenditures of the Division of Athletics cannot exceed the amount of fees collected and deposited in the Athletic Commission fund if the appropriation exceeds the amount.

"Some of these exhibitions are now being televised and in some parts of the country theatres are sold exclusive rights to televise

> live fights or boxing bouts and wrestling exhibitions. Televised exhibitions naturally cut the attendance at the real exhibition hence reduces the collections and threatens ultimate elimination of state supervision and enforcement of regulations.
>
> "1. Can the Missouri Athletic Commission under existing laws collect five percent of the gross admission receipts of theatres when they have exclusive rights and do televise live boxing or wrestling exhibitions in the State of Missouri?
>
> "2. Can the State Athletic Commission collect from promoters or sponsors five percent of the gross amount paid by theatres for the right to televise live prize fights and wrestling exhibitions?
>
> "3. If the answer to the above questions is negative, please suggest a legal method for the Athletic Commission to collect a fair share of receipts resulting from boxing bouts and wrestling exhibitions held under its authorization and supervision which are live televised."

The Athletic Commission of the State of Missouri derives its authority to tax boxing, sparring or wrestling exhibitions from Section 317.020, RSMo 1949, which provides, in part, as follows:

> "That the athletic commission of the state of Missouri shall have general charge and supervision of all boxing, sparring and wrestling exhibitions held in the state of Missouri, and it shall have the power, and it shall be its duty:

* * * * * *

"(3) To charge fees for such license of ten dollars for every license issued and to charge five per cent of the gross receipts of every boxing, sparring or wrestling exhibition held. * * *"

Question No. 1:

In reply to this question we call your attention to the above-quoted Section 317.020, RSMo 1949. This section authorizes and directs the Athletic Commission "to charge five per cent of the gross receipts of every boxing, sparring or wrestling exhibition held." (Underscoring ours.) A fundamental rule in the construction of statutes is embodied in the maxim, "expressio unius est exclusio alterius," which means that the express mention of one thing implies the exclusion of another.

In City of Hannibal v. Minor, Mo. App., 224 S.W. (2d) 598, l.c. 605, the court said:

"* * * There is a fundamental principle of construction which has been recognized and applied from time immemorial by our courts to such questions as we have here. It is embodied in the maxim: 'Expressio unius est exclusio alterius' which means that the express mention of one thing, person or place implies the exclusion of another. * * *"

By including in the statute authority "to charge five per cent of the gross receipts of every boxing, sparring or wrestling exhibition held," it thereby implies the exclusion of all else. Taxing gross receipts of a theater televising such an exhibition could by no stretch of the imagination be included in the authority conferred on the Athletic Commission by this statute which merely authorizes charging five per cent of the gross receipts of boxing, sparring and wrestling exhibitions.

Our answer, therefore, to Question No. 1 is "No."

Question No. 2:

In reply to your Question No. 2 we are of the opinion that the State Athletic Commission not only can, but that under the statute, Section 317.020, RSMo 1949, it is its duty to collect from promoters or sponsors five per cent of the gross receipts paid for the right to televise live prize fights and wrestling exhibitions held in the state. The money paid for the right to televise boxing, sparring or wrestling exhibitions is as much a part of the gross receipts as the gate receipts or admission charges, and five per cent of the gross amount of such receipts should be charged by the commission.

What is the meaning of "gross receipts?" In Savage v. Commonwealth ex rel. State Corporation Commissioners, 186 Va. 1012, 45 S.E. (2d) 313, l.c. 317, which is a "gross receipts" tax case, the court defined "gross receipts" as follows: "The words, 'gross receipts," mean whole, entire, total receipts. * * *" (Underscoring ours.) Webster defines "gross" as follows: "4. Whole; entire; total; as, the gross sum, amount, weight; -- opposed to net. The gross earnings, receipts, or the like, are the entire earnings, receipts, or the like, under consideration, without any deduction."

The same definition appears in State v. Hallenberg-Wagner Motor Company, Mo. Sup., 108 S.W. (2d) 398, at l.c. 401.

In City of Lancaster, Appellant, v. Briggs & Melvin, Respondents, 118 Mo. App. 570, the court was dealing with an ordinance which required a telephone company to pay the city two per cent per annum of the "gross receipts" collected by the company for the use of the streets and alleys of the city to carry the poles, lines and wires necessary to the operation of a telephone exchange. The court at l.c. 574-576 said:

> "Defendants filed the required statements and paid to the city the sums shown in them to be due under the ordinance, but it is contended by plaintiff that items of revenue earned by the business and received by defendants were omitted and this suit

is for the recovery of two per cent of the aggregate of such omitted items. It is conceded by defendants that the receipts reported were confined to those derived solely from the rental of telephones in the city and it is argued by them, and this was the view taken by the learned trial judge, that the ordinance imposed no other burden on defendants than to pay to the city two per cent of the gross receipts from such rentals, while plaintiffs insists that the words 'gross receipts collected from the use of said telephone system' include earnings received from 'long distance' service rendered by defendants to their patrons as well as rentals collected for telephones used in the city.

* * * * * *

"* * * Therefore, if defendants operated long distance lines connecting Lancaster with other cities and towns over which they conducted a toll business, or as a part of their business operated exchanges in neighboring towns, the earnings of such divisions of their telephone system would not be subject to the charge under consideration. <u>But it equally is as clear the parties intended that the earnings from all sources of the system within the city should be included in the term 'gross receipts.'</u> These earnings, it is fair to assume in the state of the case before us, consisted not only of rentals paid for the use of telephone instruments in the city but also included a percentage received by defendants of the proceeds of toll line business that required the services of the Lancaster exchange in its transaction. All such income

> actually received by defendants under contracts with the owners of independent connecting lines on account of the service of the Lancaster exchange in the transmission or delivery of long distance business certainly belongs to the gross receipts of that exchange and with respect to tolls received by defendants for long distance service over lines and exchanges operated entirely by them, the reasonable value of the services rendered by the Lancaster exchange to that class of business should be regarded as a part of the gross receipts of that exchange. * * * The city is entitled to its percentage of all of the earnings of that exchange received from all classes of patronage and to nothing more, and the court erred in its interpretation of the term 'gross receipts.'"

The court in City of Lancaster v. Briggs & Melvin, supra, properly held that the city should not be limited to receipts solely derived from the rental of telephones, but that "gross receipts" also included earnings from long-distance telephone service as well as rentals collected for telephones used in the city. It was held that the city was entitled to the percentage of all the earnings that the exchange received from all classes of patronage.

In Taylor v. Rosenthal, (Ky.), 213 S.W. (2d) 435, l.c. 437, the court commented on the subject of tax levy on "gross receipts" as follows:

> "Appellant cites several cases, such as Sandusky Gas & Electric Co. v. State, 114 Ohio St. 479, 151 N.E. 685; Cincinnati Milford & Loveland Traction Co. v. State, 94 Ohio St. 24, 113 N.E. 654; State v. Central Trust Co. 106 Md. 268, 67 A. 267; State v. Hallenberg-Wagner Motor Co., 341 Mo. 771, 108 S.W.

> 2d 398, which are tax cases. It is evident that they are not in point here. When a tax is levied on 'gross receipts' it applies to every penny a person, firm or corporation takes in regardless of the source from which it comes. Also, it is apparent that City of Lancaster v. Briggs, 118 Mo. App. 570, 96 S.W. 314, cited by appellant, is not controlling here, since it only determines that receipts from long distance calls constitute a part of the gross receipts of a telephone system."
>
> (Underscoring ours.)

In Sandusky Gas & Electric Co. v. State, 114 Ohio St. 479, 151 N.E. 685, l.c. 687, the court said:

> "The levy of an excise tax upon the gross receipts of public utility companies is made pursuant to the provisions of sections 5417, 5474, 5475, and 5483, General Code, and the words 'entire gross receipts,' as there employed, mean and include the entire receipts of such company from the intrastate business done by it under the exercise of its corporate powers, whether from the operation of the utility itself or from any other business done by it."

In Madison Avenue Coach Co., Inc., v. New York City, 82 N.Y.S. (2d) 270, l.c. 271, the court said:

> "This is a motion for judgment on the pleadings. Plaintiff has instituted an action for a judgment declaring its rights under a franchise granted it by the defendant City. It appears that under the franchise plaintiff is obliged to pay a fixed percentage of its gross income to the defendant. In computing the gross, plaintiff includes

> the sum received from a lease of the privilege of installing advertising cards in its buses. Under this lease plaintiff receives from its lessee a percentage of the amount the latter is paid by the advertisers. Defendant urges that the franchise percentage should be computed on the gross received by the plaintiff's lessee and not on what plaintiff receives.
>
> "Examination of the franchise discloses that gross receipts include 'revenues of the Company' (plaintiff) 'from whatever source derived, either directly or indirectly, in any manner, from or in connection with the operation of the route.' Receipts from advertising in the buses is clearly within such a definition. * * *"
>
> (Underscoring ours.)

In Commonwealth v. Brush Electric Light Company, Appellant, 204 Pa. 249, l.c. 252, the court said:

> "By section 23 of the Act of June 1, 1889, P.L. 420, electric light companies are taxed eight mills upon the gross receipts from their business. The appellant, such a company, claims exemption from this tax upon certain items in its gross receipts, because they are not derived from electric lighting. They are for electric power furnished to individuals and corporations for manufacturing purposes and for sales of electric supplies, such as lamps, drop lights, fans, etc. The contention of the appellant is, that, as it is incorporated as an electric light company, only its gross receipts from electric lighting are taxable. But such are

> not the words of the statute. They are clear and unambiguous, as they must be, if the commonwealth is entitled to the taxation imposed: Boyd v. Hood, 57 Pa. 98. The tax is not to be paid upon the gross receipts from electric lighting, but upon the gross receipts from the business of the company. For the purpose of enlarging and swelling the volume of its business, it furnishes not only electric light, but electric power to manufacturers and sells electric supplies. Having so extended its business beyond the mere furnishing of light by electricity, the company has largely increased its revenues, and it would be a strained construction of the words of the statute if the gross receipts from its business should be interpreted as meaning only its gross receipts from electric lighting, simply because it is called an electric light company. It is taxed on what it does. The statute imposes the tax not upon a portion of its receipts--those derived from a particular commodity it supplies to the public--but upon all of its receipts from its general business conducted under its franchises. Having, under what it regards as its franchises not questioned by the commonwealth, enlarged its business by extending the same beyond the mere furnishing of light, and having realized largely increased revenue from so doing, its plea for abatement of the tax claimed by the state is ungracious, and cannot avail it in the face of the statute declaring what it shall pay. * * *"

When the Legislature empowered the Athletic Commission to "charge five per cent of the gross receipts" of every

boxing, sparring or wrestling exhibition, it certainly did not mean that the charge be placed on only a part of the gross receipts or just gate receipts or admission charges -- it evidently meant by "gross receipts" the whole, the entire, the total receipts, which is all inclusive.

If there is any exemption from a tax, the burden is on the claimant to establish clearly his right to such exemption.

In re First National Safe Deposit Co., Mo. Sup., 173 S.W. (2d) 403, l.c. 405, Leedy, J., speaking for the Supreme Court of Missouri, said:

> "It is the general rule that taxing statutes are to be strictly construed in favor of the taxpayer, and against the taxing authority; but this does not extend to exemption provisions of such statutes. The applicable rule in the latter connection is as stated in State ex rel. St. Louis Y.M.C.A. v. Gehner, 320 Mo. 1172, 11 S.W. 2d 30, 34: ' * * * no such exemption can be allowed, except upon clear and unequivocal proof that such release is required by the terms of the statute. If any doubt arises as to the exemption claimed, it must operate most strongly against the party claiming the exemption. * * * "Such statute and constitutional provisions are construed with strictness and most strongly against those claiming the exemption. * * * the burden is on the claimant to establish clearly his right to exemption." * * *' See, also, State ex rel. Spillers v. Johnston, 214 Mo. 656, 113 S.W. 1083, 21 L.R.A., N.S., 171; 1 Cooley on Taxation, 3d Ed., 357, 358."

It is our opinion that in the statute under consideration that "gross receipts" means "the whole, the entire, the total receipts," and that it is the duty of the Athletic Commission to collect from promoters or sponsors

Honorable Bert Cooper

of all boxing, sparring and wrestling exhibitions held in the state five per cent of the "gross receipts" of such exhibitions, and the amount received for television rights should be included in the "gross receipts."

We, therefore, are of the opinion that your Question No. 2 should be answered in the affirmative.

Question No. 3:

In view of the fact that our answer to Question No. 2 is in the affirmative, we assume you desire no answer to Question No. 3.

CONCLUSION

It is the opinion of this department that:

(1) The Missouri Athletic Commission, under the existing laws, cannot collect five per cent of the gross admission receipts of theaters when they have exclusive rights and do televise live boxing, sparring or wrestling exhibitions in the State of Missouri; and

(2) The State Athletic Commission can and it is its duty to collect from promoters or sponsors five per cent of the gross amount paid for the right to televise live boxing, sparring and wrestling exhibitions held in the state as such amount is a part of the "gross receipts" of such exhibitions.

Respectfully submitted,

GROVER C. HUSTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GCH/feh

CONSERVATION COMMISSION)
FISH AND GAME)

Validity of license by the Department of the Army for wildlife management purposes at Bull Shoals Reservoir Area.

FILED
19

February 13, 1952

2-13-52

Missouri Conservation Commission
Jefferson City, Missouri

Attention: Mr. Paul Q. Tulenko
Chief, Game Section

Gentlemen:

This will acknowledge receipt of your request to examine the attached license by the Department of the Army for wildlife management purposes at Bull Shoals Reservoir Area in the State of Missouri and render an opinion as to the validity of said license and also if it makes you legally liable in any manner.

Under Section 4 of the Flood Control Act, 1946, 60 Stat. 641, 642, the chief engineers under the supervision of the Secretary of War were authorized to construct, maintain and operate public parks and recreational facilities in reservoir areas under the control of the War Department and to permit construction, maintenance and operation of such facilities. Furthermore, the Secretary of War under said act was specifically authorized to grant leases of lands, structures and facilities thereon, for such periods and terms that he deemed reasonable. It further provided that preference shall be given to the Federal, State and local governmental agencies. However, all such leases were granted under such rules and regulations as the Secretary of War deemed necessary. Subsequent thereto, the Act was amended which merely changed the title of the Secretary of War to the Secretary of the Army. (See 460d, Title 16, U.S.C.A.)

Under the foregoing acts of Congress, the Secretary of the Army now has supervision of the lands, structures and facilities in the State of Missouri. We find nothing in the aforesaid act and amendments thereto which in any manner will prevent the issuance of such a license or permit and the Commission entering into such an agreement. Certainly the Secretary of the Army has specific authority to execute such an instrument, subject to all rules and regulations promulgated by him for any period and on whatever terms he deems reasonable.

Missouri Conservation Commission

You mention the fact that you have made certain corrections shown in red pencil on the attached form of license, and we believe that these corrections are well taken. However, the instrument as originally drawn is valid and likewise it would be valid if the corrections indicated or included as a part of said instrument.

You further inquire if you decide to execute this instrument if it will in any manner make you liable. Under the instrument, the only liability the Commission would incur would be damages to property on said area and for the violation of any rules and regulations promulgated by the Secretary of the Army covering said area.

CONCLUSION

Therefore, it is the opinion of this department that the attached license for wildlife management purposes at Bull Shoals Reservoir Area in the State of Missouri is in proper legal form and valid and that the only liability that the Commission may incur under such a license is for damages to property on said area and for violation of rules and regulations promulgated by the Secretary of the Army covering said area.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARH:VLM

SCHOOLS: Board of Curators of the University of Missouri authorized to maintain and operate a TV station in connection with educational function of the university.

RADIO AND TELEVISION:

FILED 19

August 1, 1952

8-14-52

Mr. Lester L. Cox
Member, Board of Curators
University of Missouri
Columbia, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this department for the Board of Curators of the University of Missouri, which, in part, reads:

> "At its regular meeting held Friday, April 11th, Hotel Muehlebach, Kansas City, Missouri, the Board of Curators unanimously approved courses in television and radio broadcasting, both oral and visual, which would include all of the arts and sciences pertaining to oral and visual broadcasting. These courses will be in use beginning September of this year. It is, therefore, requested that you give us an opinion based upon the fact that we will have television and radio broadcasting courses and that it is our desire to establish a television broadcasting station at the University of Missouri for the basic purposes of teaching and training students in these respective arts.
>
> "While a portion of the programs may be sold for commercial purposes, the basic purpose will be for teaching. We believe that by having commercial programs in connection with the regular studies by our students, they will get practical and

> first-hand knowledge of commercial radio and television in which field they will be trained. It is also understood that there will be no basis of profit from the operation of television as any amount that is received for commercial purposes will be reinvested in the training of such students in the various broadcasting arts or in acquiring additional equipment for their training.
>
> "If your good offices will furnish us an opinion based upon these facts, stating that the Board of Curators has incorporated as a part of its curriculum actual courses in television science, that because of such action the Curators would be authorized to operate a television station in order to provide complete and actual training facilities in connection with these courses. Your help will certainly be appreciated as the freeze on television is lifted, and we would like to have a letter from your office along this line to attach to our application to the FCC."

In advising you on the question presented it becomes necessary to consider certain constitutional and statutory provisions relating to the government and operation of the university.

Regarding the government of the University of Missouri, Section 9(a) of Article IX of the Missouri Constitution provides:

> "The government of the State University shall be vested in a board of curators consisting of nine members appointed by the governor, by and with the advice and consent of the senate."

In this connection Section 172.010, RSMo 1949, provides:

> "A university is hereby instituted in this state, the government whereof shall be vested in a board of curators."

Section 172.020, RSMo 1949, in part, provides:

> "The university is hereby incorporated and created a body politic, and shall be known by the name of 'The Curators of the University of Missouri,' and by that name shall have perpetual succession, power to sue and be sued, complain and defend in all courts; to make and use a common seal, and to alter the same at pleasure; to take, purchase and to sell, convey and otherwise dispose of lands and chattels; to act as trustee in all cases in which there be a gift of property or property left by will to the university or for its benefit or for the benefit of students of the university; to condemn and appropriate real estate or other property, or any interest therein, for any public purpose within the scope of its organization, in the same manner and with like effect as is provided in chapter 523, RSMo 1949, relating to the appropriation and valuation of lands taken for telegraph, telephone, gravel and plank or railroad purposes; * * *"

Under the provisions of the last-quoted section the university is established as a corporate entity, and as such has such powers as are expressly conferred upon it, such as to sue and be sued; to take, purchase, sell and otherwise dispose of lands and chattels; to condemn and appropriate real estate and other property.

The Supreme Court of Missouri has also declared that the Board of Curators, acting in behalf of the university, has broad power conferred on it by implication. Thus in State ex rel. Curators of University of Missouri v. McReynolds, 354 Mo. 1199, 193 S.W. (2d) 611, the court, in determining that the board had implied power to issue revenue bonds to finance the erecting of dormitories, said at S.W. l.c. 613:

> "Although the Legislature has specifically authorized cities to issue revenue bonds, the fact it has not given the curators such express power does not prevent the implication of such power. The broad powers historically exercised by the curators without specific legislative authority

> or appropriations present a different situation from an ordinary municipal corporation depending entirely upon taxation for its support and with powers rigidly limited by statute or charter."

Section 172.100, RSMo 1949, vests the curators with the powers to make bylaws or ordinances, rules and regulations as may be expedient for the accomplishment of the trust reposed in them, which would be the government of the State University. Thus the section reads:

> "The curators shall have power to make such bylaws or ordinances, rules and regulations as they may judge most expedient for the accomplishment of the trust reposed in them, and for the government of their officers and employees, and to secure their accountability, and to delegate so much of their authority as they may deem necessary to such officers and employees or to committees appointed by the board."

In the case of Pyeatte v. Board of Regents of University of Oklahoma, 102 F. Supp. 407, the court was considering similar constitutional and statutory provisions contained in the Oklahoma statutes in determining the powers of the Board of Regents of the University of Oklahoma. At l.c. 413 the court said:

> "Title 70 O.S.A. Sec. 1218 provides as follows: 'The said board of regents shall make rules, regulations and by-laws for the good government and management of the university and of each department thereof; prescribe rules and regulations for the admission of students * * *.'
>
> "Over and above the express power conferred upon the Board of Regents by the statutory provision, the Oklahoma Constitution also provides for government of the University by the Board of Regents. Article 13, Sec. 8, Oklahoma Constitution. The term 'government' is very broad and necessarily includes the power to pass all rules and regulations which the Board of Regents considers to be for the benefit of the health, welfare, morals and education of the students, so long as such

> rules are not expressly or impliedly prohibited. Rheam v. Board of Regents of University of Oklahoma, 161 Okl. 268, 18 P. 2d 535."

The Constitution of Missouri, like that of Oklahoma, vests the government of the State University in a particular board. The Legislature, by statutory enactment, has expressly conferred broad regulatory power on said board in order that it may accomplish the trust reposed in it in governing the university.

Therefore, it would appear that the Board of Curators of the University of Missouri would have the power to pass rules and regulations and to take such other measures as it would consider to be for the benefit of the health, welfare, morals and education of the students receiving educational advantages from that institution, so long as such rules and regulations were not expressly and impliedly prohibited.

By legislative enactment there has been established in connection with the State University, and as distinct departments thereof, a College of Agriculture and a School of Mines and Metallurgy. It is so provided by Section 172.430, RSMo 1949.

However, there are several other departments of the State University which have not been provided for by an act of the Legislature, but which nevertheless have been created in carrying out the educational program of the school. Some of these are the departments of journalism, law, medicine, etc.

Moreover, the Legislature has recognized the existence of departments of the university other than that of agriculture and mines and metallurgy. Thus Section 172.450, RSMo 1949, provides:

> "The college of agriculture and the school of mines and metallurgy herein provided for shall have each a separate and distinct faculty, whose officers and professors may be the same, in whole or in part, as the officers and professors in other colleges and departments of the university."

Presumably the establishment of these other educational departments was done under the direction of the Board of Curators exercising power conferred upon it by earlier constitutional and statutory provisions similar to those above cited and quoted.

Furthermore, in expanding the educational facilities of the university the Board of Curators has recently approved the institution of courses in television and radio broadcasting, as you have outlined it in your request. The authority for instituting said courses stems from that expressly and impliedly conferred by the constitutional and statutory provisions above cited.

The question which you have presented is whether or not, in connection with said courses, the Board of Curators is authorized to establish and operate a television broadcasting station at the university for the basic purpose of supplying students complete educational training in these respective arts. It is further understood that, if such a station is established, it would in some degree be used for commercial purposes in the manner indicated and the income or money received from its commercial use would be reinvested in the training of students and in acquiring additional equipment.

If such authority exists for the Board of Curators of the University of Missouri to establish a television broadcasting station and operate it as outlined, it must stem from implied powers for nowhere in our laws is such authority expressly conferred.

Apparently the appellate courts throughout the country have rarely had occasion to consider the right of colleges and universities to engage in or to conduct commercial or semi-commercial activities in connection with their educational curriculums for there is a dearth of authority on the question.

In the case of Long v. Board of Trustees, 24 Ohio App. 261, 157 N.E. 395, a taxpayer's injunction suit was instituted against the Board of Trustees of Ohio State University to restrain them from establishing and maintaining a book store. For some years a private corporation had maintained a book store on the campus to sell books and supplies to students and professors. The Board of Trustees desired to operate a state book store and sell books and supplies to the students on practically a cost basis. They purchased the stock inventory of the private corporation, assumed a certain amount of indebtedness of the corporation and made additional purchases of merchandise amounting to several thousand dollars. In deciding the case favorably to the Board of Trustees, and dismissing the plaintiff's petition, the court, at N.E. l.c. 396, 397, said:

> "The constitutional question is a challenge to the right of the state, or an agency of the state, to engage in a commercial enterprise, where such enterprise is incidental

to or closely connected with a legitimate function of the state. This is a far-reaching proposition. Originally the governmental functions of the state were simple, and confined strictly to state functions; but as the state has advanced the government becomes more complex. In comparatively recent years the state has enlarged the scope of its enterprises so as to include many that have heretofore been considered as purely private enterprises. These are mostly, if not entirely, cases or instances where a commercial or private enterprise is carried on as accessory to some legitimate function of the state. This is especially true with respect to the universities of the state.

"The Ohio State University is by statute made a body corporate, and very broad general powers have been conferred upon it in respect to the adoption of by-laws, rules and regulations for the government of the University, and no express limitation is found as to the general scope of the powers and duties of the trustees as to the business to be carried on by the University.

"It would follow, necessarily, that all the enterprises undertaken by the University should be reasonably incidental to the main purpose, to wit, the maintenance of a University. The Ohio State University has for many years to a limited extent engaged in the furnishing of supplies to University students upon a cost basis. We see no reason why this is not a legitimate enterprise of the University, subject to such limitations as may be imposed by statute.

* * * * *

"The State University, by its board of trustees, has been given general authority by statute to maintain a University and to provide for the control and government thereof, and that authority would include an enterprise reasonably incidental to the main purpose of

> the University. There are no such limitations with respect to the board of trustees of the Ohio State University as to interfere with or prevent the incidental enterprise under consideration. * * *"

In the case of Davie v. Board of Regents of the University of California, 66 Cal. App. 693, 227 P. 243, a suit for damages was instituted against the University of California by a student charging personal injuries received, resulting from the alleged negligence of a physician who performed an operation on the plaintiff in the infirmary maintained by the university. Under the rules and regulations of the university, students enrolling, and thereafter semiannually, were required to pay a three dollar infirmary fee which entitled them to consultation and ordinary medical service. However, for surgical operations the cost thereof had to be borne by the patient. It was alleged that from said fees from all students the university realized considerable profits, and that maintaining the hospital by the Board of Regents of the university was something separate and apart from any educational function and was in fact a proprietary or private function of the university. The Appellate Court of California, in upholding the sustaining of a demurrer to the plaintiff's petition, said at P. 244, 246:

> "The main contention of appellant and the one chiefly relied upon for a reversal is that the complaint shows that defendant has undertaken to do something separate and apart from any educational functions, and in consequence thereof has become liable for the alleged tortious act. In support thereof it is argued that the defendant corporation, the Regents of the University of California, has a dual character - governmental and also proprietary and private - and when acting in the latter capacity its liabilities arising out of either contract or tort are the same as those of natural persons or private corporations, and he invokes the application in his favor of the rule established by the decisions of this state, that a municipal corporation is liable for torts of its agents committed in the performance of activities or functions purely private and proprietary in their nature.

> "Respondent, on the other hand, contends that the pleading shows on its face that the infirmary is maintained as a part of the University of California, operated only in connection with the educational functions thereof, and this being so, it is not liable for the torts of its agents committed in connection therewith. * * *
>
> * * * * *
>
> "We do not deem an extensive review of the authorities from the other states essential, and it would answer no useful purpose. Suffice it to say that they generally hold that the maintenance of a hospital by a municipality is a governmental function, and that in the conduct thereof the municipality is not liable for the tortious acts of its employees.
>
> "Reading the complaint in the present action from its four corners, it conclusively appears therefrom that the infirmary in question is conducted by the defendant corporation for the exclusive use of the students, and that it is so conducted by it for the sole purpose of safeguarding and protecting the health of the student body. This being so, it is in no sense an organization for profit, and the imposition of the small fee does not convert this governmental function into a proprietary one. * * *
>
> "This being so, the promotion and welfare of the students in this respect must be held to be the exercise of a duty involving governmental functions in the highest degree."

In Fanning v. University of Minnesota, 183 Minn. 222, 236 N.W. 217, a taxpayer's injunction suit was instituted to enjoin the erection of a dormitory. Part of the cost of building the dormitory was to be realized from earnings of the university press which did work not connected with the university. In ruling that this was proper the Supreme Court of Minnesota said, S.W. l.c. 220:

> "The university has a so-called university press intended primarily for its own publications and incidental university uses. It prints for the departments and charges them. This is a matter of accounting. It does work not connected with university purposes at not less than current rates. These earnings it puts in the dormitory fund. The earnings are incidental to the use of the plant for university purposes. The board has not established a printing plant in competition with private plants and does not contemplate doing so. It is only this, that earnings accrue for work conveniently done by its press, but wholly incidental to its main use for proper university purposes, and it chooses to use them in building a dormitory. There is no legal objection." (Emphasis ours.)

However, in State ex rel. v. Southern Junior College, 166 Tenn. 535, 64 S.W. (2d) 9, the Supreme Court of Tennessee upheld an injunction ordered by the lower court to enjoin the school from engaging in the commercial printing business. But we believe this case can be distinguished from the Fanning case. The junior college was a private institution operating under a charter and the powers conferred therein. The school, among other courses, offered one in printing, and maintained a printing shop. Two experienced printers were employed as foremen, and the students taking the printing course did the other work in the shop. The evidence also showed that 62½% of the work done was commercial printing, in direct competition with other private printers. It also appeared from the evidence that the total profit of the print shop for the year 1932 was applied to the general purposes of the school rather than to maintain and operate the print shop. Furthermore, the charter under which the college operated contained an expressed provision that it shall not possess the power to buy or sell products or engage in any kind of trading operation. In ruling on the case the court, at S.W. l.c. 10, said:

> "The chancellor expressed the opinion that there was obviously no express power conferred upon the defendant by its charter to operate a commercial printing shop, and that no such authority could be implied from the powers granted, since the carrying on of the business of commercial printing had no reasonable relation to the conduct

> of the school. The chancellor further thought that the charter denial of power on the part of the corporation 'to buy or sell products or engage in any kind of trading operation' was an express prohibition against the conduct of a commercial printing shop by it.
>
> "These conclusions seem to us to be unavoidable. Instead of being an incident, the commercial feature absorbed the greater part of the activities of this printing shop. Without doubt the defendant school was entitled to own a printer's outfit and to use that outfit in giving practical instructions to the students in this art. The institution, however, had no authority to employ this equipment commercially in the printing trade, and the chancellor properly so held.
>
> * * * * *
>
> "We are satisfied that the defendant school here is not entitled to operate its printing shop as formerly until it obtains additional authority from the Legislature."

In the case of Batcheller v. Commonwealth ex rel. Rector and Visitors of University of Virginia, 176 Va. 109, 10 S.E. (2d) 529, the court was considering the authority of the Rector and Visitors of the University of Virginia to obtain a permit for the establishment, maintenance and operation of an airport. The school offered specific courses in the science of aeronautics, and the operation of the airport, if permitted, was to be done in connection with these courses. In holding that the university could operate the airport the Supreme Court of Virginia took judicial notice of the fact that similar institutions, as well as the university itself, were operating incidental and necessary enterprises. In ruling on the question the court, at S.E. 534, 535, said:

> "The pilots and operators who will own the aircraft which will be used for student flight instruction and the business transactions of these parties with the Authority will be commercial. This, however, is purely incidental to the main purpose of

the University in this connection, namely, the training of students in the science of aeronautics. * * *

* * * * *

"The University by Sec. 806 of the Code of 1919 is a corporation. It has all of the powers possessed by other corporations under the provisions of Chapter 147 of the Code. It has not only the powers expressly conferred upon it, but it also has the implied power to do whatever is reasonably necessary to effectuate the powers expressly granted. 13 Am. Jur., Corporations, Sec. 740.

"The University has for many years engaged in many necessary and incidental enterprises which might be termed commercial. Judge Fletcher, speaking for the commission, says:

"'The University in making application for the permit in question was not asking for the right to engage in commercial aviation, but only for the right to operate and conduct an airport for the landing and departure of civil aircraft engaged in commercial aviation, upon which there could be given instruction in student flying so necessary and essential to its course in aeronautics. The planes (not owned by the University) operating on such field will be engaged in commercial aviation, but that fact would not involve the University in commercial aviation - the most that can be said in reference to the granting of the permit is that the University will be authorized by the permit to own and operate an airport upon which aircraft engaged in commercial aviation may land or take off, but this would not involve it in a purely commercial or industrial enterprise, but, as has been shown, in an enterprise necessary to and incidental to the full and complete instruction in the course in aeronautics which it has established.

> "'The objection to the granting of the proposed airport on the ground that it involves the University of Virginia in a commercial activity, would seem not to be well founded in view of other incidental enterprises conducted by the University of Virginia and by institutions of the state similar to the University, the authority to conduct such enterprises having been generally accepted. There would seem to be but little distinction between the acquisition and operation of an airport of the nature of that applied for and of other activities conducted by the University of Virginia, of which, in so far as such facts do not definitely appear of record, the Commission takes judicial notice, as being matters of common knowledge, of public record, of government, etc., and which would seem under the authorities to be permissible. * * *'
>
> "The University operates a large hospital, a farm, a dining hall, and many other necessary but incidental enterprises. The same is true of other State educational institutions.
>
> "Upon the whole we are of opinion to affirm the order of the commission."

In Villyard v. Regents of University System of Georgia, 204 Ga. 517, 50 S.E. (2d) 313, suit was instituted to enjoin the defendants from operating a laundry and dry-cleaning business and furnishing services at reduced prices. Said business was being operated at one of the state colleges, and the customers were both students and the public, consisting mostly of general employees, faculty members, executive officers, and their respective families. In ruling on the question, and upholding the right to conduct said business, the Supreme Court of Georgia said, S.E. l.c. 315, 316:

> "The duties and powers of the Regents of the University System of Georgia are set forth in the Code, Secs. 32-101 et seq. They are untrammelled except by such restraints of law as are directly expressed, or necessarily implied. 'Under the powers granted, it becomes necessary * * * to look for limitations, rather than for authority to do specific acts. * * * Limited only by

their proper discretion and by the Constitution and law of this state, they may "exercise any power usually granted to such corporation." State v. Regents of the University System of Ga., 179 Ga. 210, 227, 175 S.E. 567, 576.

"Whether or not the operation of a laundry and dry-cleaning service by a State college at reduced prices for the benefit of students, faculty members, and persons connected with the institution, constitutes unfair competition, is a question of first impression in Georgia.

"In Davison-Nicholson Co. v. Pound, 147 Ga. 447(4b), 94 S.E. 560, this court, in dealing with the powers and duties granted by the legislature to the board of trustees of a State educational institution, held that 'the right to protect a public educational institution and its student body is equal to or superior to the right of one, as a merchant, desiring to deal with such institution, or its students'.

"In other jurisdictions, enterprises held to be reasonably related to the education, welfare, and health of student bodies, and therefore not to constitute unfair competition, include the following: cafeterias which were operated primarily for the student body, but which also served the faculty, and occasionally parents and visitors. Goodman v. School District, 10 Cir., 32 F. 2d 586, 63 A.L.R. 92 and annotation on page 100; Ralph v. Orleans Parish School Board, 158 La. 659(2), 104 So. 490; Hempel v. School District, 186 Wash. 684, 59 P. 2d 729; Bozeman v. Morrow, Tex. Civ. App., 34 S. W. 2d 654; rental of school property for opera, public dance, or community purpose, in competition with private business (Beard v. Board of Education of North Summit School Dist., 81 Utah 51, 16 P. 900; Young v. Board of Trustees of Broadwater County High School, 90 Mont. 576(8), 4 P. 2d 725; Merryman v. School District No. 16, 43 Wyo. 376, 5 P. 2d 267, 86 A.L.R. 1181); operating a store for the purpose of selling books and other student supplies to university students and professors upon a cost basis (Long v. Board of Trustees

> of Ohio State University, 24 Ohio App. 261(1), 157 N.E. 395); operating a university press for work done outside of that done for university, the earnings being incidental to its use for university purposes (Fanning v. University of Minnesota, 183 Minn. 222(5), 236 N.W. 217); maintenance of a recreation center. Dodge v. Jefferson County Board of Education, 298 Ky. 1(2), 181 S.W. (2d) 406; operation of a university infirmary Davie v. Board of Regents of University of California, 66 Cal. App. 693, 227 P. 243; manufacture and distribution of hog-cholera serum to farmers and swine-growers at cost (Fisher v. Board of Regents of the University of Nebraska, 108 Neb. 666, 673, 189 N.W. 161.
>
> "Applying the above legal principles to the facts of the present case, if the operation of the laundry and dry-cleaning service, at a price less than the commercial rate for the benefit of those connected with the school, is lawful, it matters not that such enterprise is competitive with the plaintiffs' business. 'When free public schools were first established, they competed with and ultimately drove from the field numerous private schools, but those who conducted the private schools could not complain of unfair competition since the state had the right to establish the free school system. Universities and colleges established by the states are in direct competition with privately controlled colleges, but the competition is not unfair nor unlawful because the state has the power to establish its universities and colleges, and to support them by taxation.' Beard v. Board of Education of North Summit School Dist., 81 Utah 51, 56, 16 P. 2d 900, 902, supra."

In the Batcheller case the court pointed out that the university had for many years been engaged in incidental enterprises which might be termed "commercial." The same is also true regarding the University of Missouri.

To name some of the incidental commercial activities conducted at the university, there is maintained and operated a

university book store, a cafeteria, a dairy and dairy salesroom where all dairy products are sold, sales of poultry and eggs are made, in connection with horticulture there are orchards maintained and fruit therefrom is sold, in connection with field crops seeds of various kinds are sold, in connection with the instruction in forestry trees and shrubs are sold, in animal husbandry stock is sold, and, also, a university hospital and infirmary are maintained.

We have been informed by Federal Communication authorities that other state educational institutions maintain and operate radio broadcasting stations, and in one instance a television station is operated together with a broadcasting station. Some of these schools are: University of Oregon, Michigan State, University of Minnesota, University of Wisconsin, University of Florida, University of Illinois, University of North Dakota and University of South Dakota, and Iowa State at Ames, Iowa, has both a broadcasting and television station.

While the traditional idea regarding the function of the university is that of furnishing education to the students on the campus attending the school, there is also carried on an extensive adult education and extension service program for the purpose of bringing education to the people of Missouri throughout the state.

This program is a part of the educational facilities of the university carried out under its direction and control. Courses in many phases of education are conducted in different localities throughout the state. Catalogues are prepared by the university giving information regarding the adult education and extension service program.

The Legislature makes sizeable appropriations for the university to conduct this program. According to figures recently furnished by the university, an appropriation for adult education and extension service in the amount of $131,750 was made for the 1951-53 biennium.

Other than the adult education and extension service program, many extramural educational activities are conducted by the university, particularly in the field of agriculture.

In recent years the value of visual aid in education has been recognized, and today it is used extensively.

Mr. Lester E. Cox

Television might be considered in its infancy, but already it has been used for educational purposes, at least in the field of medicine. Unquestionably its extended use as a teaching technique in many phases of education is forthcoming.

At the time of the adoption and passage of the constitutional and statutory provisions relating to the University of Missouri it was undoubtedly intended that the university would grow and extend its educational advantages commensurate with the times. As said by the court in the Fanning case, supra, N.W. l.c. 219:

> " * * * The statute and Constitution intended a university which would grow and develop and undertake activities in the way of research and in other respects not then visualized in the dreams of its founders. * * *"

You have stated, however, if a television station is operated by the university it will be used to some extent for commercial purposes. By this we understand that some commercial time will be sold to advertisers. It is conceivable that the marketing of television advertising in itself would be a phase of the education in that field from which students taking the courses in television and broadcasting would benefit.

As long as the maintenance and operation of a television station would be for the principal purpose of education, any commercial activities incident to its educational purpose and use would not render its operation illegal. Such we believe is in accord with the authorities heretofore cited.

CONCLUSION

In the premises, it is the opinion of this department that the Board of Curators of the University of Missouri would be authorized to maintain and operate a television station in connection with the university in carrying out its educational purpose.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:ml

AGRICULTURE: Hogs appraised and slaughtered under provisions of Section 267.160 RSMo, 1949, may be disposed of at federally approved packing plants, and claims for indemnity payable therefor by State of Missouri are legal claims to be paid, if, and when, an appropriation is made for such purpose.

September 3, 1952

FILED
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9-3-52

Honorable H. E. Curry
State Veterinarian
Department of Agriculture
Jefferson City, Missouri

Dear Mr. Curry:

The following opinion is in reply to your recent request reading as follows:

> "You have probably noticed in the paper that plans were under consideration for indemnifying owners of swine that have been, or may be found to be, affected with the contagious, infectious disease of swine known as vesicular exanthema, which is comparable to foot and mouth disease affecting cattle, sheep and swine.
>
> "Mr. Charles, Brannan, Secretary of the U. S. Department of Agriculture, has declared this condition to be an emergency; and the Federal Government are drawing up plans for indemnifying owners of animals that may be slaughtered at packing establishments operating under federal inspection. We are advised the plan will provide for the federal and state governments to participate in the paying of such indemnities on a fifty-fifty basis. I have been requested to advise the Chief of the U. S. Bureau of Animal Industry whether Missouri would be in a position to participate in such a plan; and before making any commitments obligating the State of Missouri for payment of indemnities in connection with this matter, I respectfully request a ruling on this question.
>
> "Is there any legal way the State of Missouri can participate in the indemnifying

> of owners of swine afflicted with or exposed to the disease known as vesicular exanthema (foot and mouth disease of swine) on a cooperative basis with the U. S. Department of Agriculture, Bureau of Animal Industry, unless such animals are killed and buried forthwith after being quarantined and appraised on the premises? It is my understanding that the Federal Government will not participate in such indemnities except in instances where such hogs are slaughtered at federally approved packing houses."

The disposition of the State legislature of Missouri with respect to cooperating with the federal government in suppression of contagious diseases among domestic livestock is clearly reflected in the language found in Section 267.070, RSMo 1949, which provides:

> "The said commissioner of agriculture and state veterinary surgeon shall cooperate with any commissioner or other officer appointed by the United States for the suppression of contagious diseases among domestic animals, so far as the provisions of this chapter and the appropriation made in accordance therewith will allow in suppressing and preventing the spread of contagious and infectious diseases among domestic animals in this state."

In your opinion request you have disclosed that vesicular exanthema is a foot and mouth disease of swine. The particular statute applicable to the quarantine, appraisal and slaughter of swine affected with or exposed to foot and mouth disease is Section 267.160, RSMo 1949, which provides:

> "1. Whenever any neat cattle, hogs, sheep or goats, quarantined by the state veterinarian or his deputy in this state, affected with, or exposed to foot and mouth disease, rinderpest or contagious pleuropneumonia, or which in anywise are capable of communicating either of said diseases to other animals, said animals shall, as soon as they are appraised, be killed by the sheriff of the county in which the animals are located, or by a representative of the commissioner of agriculture, as the state veterinarian may elect, and all of said animals shall be deeply buried, and the carcasses thereof shall be thoroughly covered by quicklime or other effective disinfectant.

"2. The appraisal of such animals shall be made jointly by the owner and a representative of the commissioner of agriculture, or by the owner and a representative of the United States department of agriculture when the federal government shall elect to so participate. In case of any disagreement a disinterested third party shall be called in and a majority decision as to the appraisal of such livestock shall be final. The representative of the commissioner of agriculture or the representative of the United States department of agriculture shall prepare an itemized statement of the appraisement in triplicate, one copy of which shall be presented to the commissioner of agriculture. The commissioner shall certify a claim for one-half of the appraisement to the governor, which shall constitute a legal claim against the state of Missouri, and on approval of the governor the account shall be certified to the state comptroller, and a warrant shall be issued therefor, but in no case shall the state pay more than is paid by the federal government for any animal or animals.

"3. No indemnity shall be paid by the state for any neat cattle, hogs, sheep or goats affected with foot and mouth disease, rinderpest or contagious pleuropneumonia, or exposed thereto, unless such animals are killed and buried forthwith after being quarantined and appraised. A careful account of the cost of the killing and the burying and also the disinfecting of the premises shall be kept by a representative of the commissioner of agriculture, or a representative of the United States department of agriculture, and one-half of the cost thereof shall be paid by the state on certificates of the commissioner to the governor, and the governor shall approve and certify same to the state comptroller and a state warrant shall be issued to the owner as payment."

It is noted that subparagraph 1 of Section 267.160, RSMo, 1949, quoted above, contains a directive as to the manner of disposal of diseased animals which have been ordered killed. Your opinion request discloses that the federal government will not participate in paying indemnities unless the hogs are slaughtered at federally approved packing houses. We find nothing in the language found at subparagraph 1 of Section 267.160, RSMo, 1949, which makes it mandatory that the hogs be disposed of only in the manner therein specified. A rule of statutory construction

particularly applicable in this instance is found restated in Morris v. Karr, 114 S.W. (2d) 962, 342 Mo. 179, l.c. 182, as follows:

> "Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather that substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory."

We view the essence of the thing to be done under the statutes in question to be to control the spread of the contagious and infectious disease infecting hogs, and if that may be as effectively done at federally approved packing houses as it is contemplated will be done by following the directory language contained in subparagraph 1 of Section 267.160, RSMo, 1949, we do not consider such statutory provision as a bar to participation in the federal plan to give indemnities. With the close supervision of this type of project by the State veterinarian and the State commissioner of agriculture, as provided by statute, in conjunction with the representative of the United States department of agriculture, we perceive of no danger to the spirit and letter of our State statutes in this regard insofar as disposal of the killer animals is concerned.

Indemnities payable under Section 267.160, supra, to effect full and complete cooperation between our state and federal government as directed in Section 267.070, supra, are limited to appropriations made in accordance with the provisions of Chapter 267, RSMo, 1949. A search of legislative acts reveals no appropriation to pay such indemnities. In the case of Armontrout v. Smith, 182 S.W. (2d) 571, 353 Mo. 486, the Supreme Court of Missouri dealt with a very similar problem involving a dangerous and contagious disease affecting cattle. On the matter of paying claims for indemnity the court spoke as follows at 353 Mo. l.c. 490:

> "*** Of course, nothing can ever be paid, on any claim against the state, until there is an appropriation. But valid agreements may nevertheless be made, before an appropriation is made to pay what is due thereunder, if there is express authority for making them."

We conclude that Sections 267.070 and 267.160, RSMo 1949, when read in the light and purpose of such enactments, constitute sufficient authority to clothe claims properly processed

under Section 267.160, RSMo, 1949, with legality entitling their payment, if and when, the legislature makes a proper appropriation therefor.

CONCLUSION

It is the opinion of this department that hogs affected with foot and mouth disease may, under authority contained in Section 267.070 and 267.160, RSMo, 1949, be appraised and subsequently slaughtered at federally approved packing plants in order to effect full cooperation with a plan whereby the Federal Government will pay one-half of the indemnity provided for disposal of such hogs; and the indemnity to be paid by the State of Missouri constitutes a valid and legal claim against the State to be disposed of if, and when, a lawful appropriation is made therefor.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:lw

SCHOOLS: Public meeting must be held to dissolve a consolidated school district. Proposition to
ELECTIONS: form common school districts cannot be submitted at the same public meeting wherein an election is conducted to vote on the proposition of dissolving a consolidated school district.



October 24, 1952

Honorable Robert E. Crist
Prosecuting Attorney
Shelby County
Shelbina, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this department, which reads:

> "Section 165.310, M.R.S.A. 1949, relates to dissolution of a consolidated school district, and provides for a public meeting of the resident voters and taxpayers in order to effect a dissolution. Please advise if under Section 165.310 or any other Section, it would be possible to effect a dissolution of a consolidated district which was organized under the reorganization plan of 1947, by having a regular election and casting ballots from morning to evening rather than having a public meeting.
>
> "Also, please advise if it would be possible to effect a dissolution of a consolidated school district and to reorganize into common school districts at the same election."

Section 165.310, RSMo 1949, provides for the procedure to be followed in dissolving or disorganizing a town, city or consolidated school district, and reads as follows:

> "Any town, city or consolidated school district heretofore organized under the laws of this state, or which may be hereafter organized, shall be privileged

> to disorganize or abolish such organization by a vote of the resident voters and taxpayers of such school district, first giving fifteen days' notice, which notice shall be signed by at least ten qualified resident voters and taxpayers of such town, city or consolidated school district; and there shall be five notices put up in five public places in said school district. Such notices shall recite therein that there will be a public meeting of the resident voters and taxpayers of said school district at the schoolhouse in said school district and at said meeting, if two-thirds of the resident voters and taxpayers of such school district present and voting, shall vote to dissolve such town, city or consolidated school district, then from and after that date the said town, city or consolidated school district shall be dissolved, and the same territory included in said school district may be organized into a common school district under sections 165.163 to 165.260."
> (Emphasis ours.)

The above statute refers to a "public meeting" rather than a special or regular election wherein the resident voters and taxpayers vote on the proposition of dissolving the school district. While the statute makes reference to a public meeting, it is apparent that when such a meeting is called an election is conducted at said meeting to vote on the proposition of dissolving the school district.

In the case of State v. Clements, 305 Mo. 297, 264 S.W. 984, the Supreme Court of Missouri had occasion to consider the above statute and what it required. The court was considering a lawsuit brought to determine whether or not a consolidated school district had been properly dissolved. In referring to what is now Section 165.310, supra, the court, at S.W. l.c. 986, said:

> "The statute does not provide for the taking of any particular steps to evidence the disorganization or dissolution of a consolidated school district by the meeting provided for in the statute, other than that two-thirds of the resident voters and

> taxpayers vote for dissolution at a meeting duly called for that purpose. Such meeting is necessarily governed by ordinary and orderly parliamentary usage, which requires that announcement be made of the decisions reached by the meeting upon questions properly pending before it, and that minutes be kept of the proceedings of such meeting. Of very necessity, such minutes constitute prima facie proof of what transpired at such meeting.
>
> " * * * Before the result of the election could be declared, ascertainment must be made by the meeting of the total number of resident voters and taxpayers of the district. The statute gave the meeting the power to dissolve the consolidated district. The power to determine, at least prima facie, all the facts authorizing such dissolution necessarily resided in the meeting itself. It seems clear, therefore, that the declaration of the minutes of the meeting, that the 394 votes cast for dissolution constituted the votes of more than two-thirds of the resident voters and taxpayers of the district, constituted prima facie proof of that fact, also. Such is the necessary result of the powers conferred upon such meeting by the Legislature. * * *"

In view of the language in the above case it is our thought the statute in question contemplates that a public meeting be held at which time an election is conducted to vote on the proposition of dissolving the school district. Such a meeting must be conducted according to the ordinary rules of parliamentary procedure, and written minutes must be kept which are prima facie proof of what transpired at the meeting and the results of the election so conducted.

It is difficult to see how a regular election could be held in the manner you have indicated and at the same time comply with all the requirements as declared by the court in the above case. Moreover, there is no statutory machinery or procedure for conducting such an election.

While the time for such a public meeting could probably be extended from morning to evening, it would still have to be conducted as a meeting in the manner outlined by the court. Therefore, in answer to your first question, the dissolution of a consolidated school district would have to be accomplished by a public meeting as required by Section 165.310, supra, rather than by a regular election.

Now to proceed to your second question.

Referring again to Section 165.310, it is provided that after the date of dissolution the territory within the school district which has been dissolved may be organized into a common school district under Sections 165.163 to 165.260.

We believe it would first be necessary to dissolve the school district in an election conducted in a public meeting before an election could be held to organize as a common school district. This would preclude voting on both propositions at the same election or at the same meeting.

Whenever a consolidated school district is dissolved it becomes unorganized territory. It was so held in State v. Consolidated School Dist. No. 3 of Pike County, 277 Mo. 28, 209 S.W. 96.

Section 165.163, RSMo 1949, provides for the organization of a common school district, and, in part, reads:

> "Whenever there shall be in this state any territory not organized into a common school district, and containing within its limits twenty or more pupils of school age, three or more taxpayers of such territory may call a meeting of the qualified voters of such unorganized territory, or such part thereof as they desire to organize into a school district, by first giving fifteen days' notice of the time, place, purpose of the meeting and boundary lines of the territory proposed to be organized. * * *"

Under the above statute it would appear that a common school district is organized from unorganized territory. Consequently the unorganized territory would first have to exist before steps could be taken as set out in the above statute to organize a common school district. We believe this would necessarily require a separate election to organize a common school

district subsequent to an election wherein a consolidated district was dissolved and which resulted in the creation of unorganized territory.

In the Pike County case, supra, the trial court by its judgment undertook to dissolve a consolidated district and at the same time re-create the former common school districts. In holding that the trial court had no such power the Supreme Court, at S.W. l.c. 98, said:

> " * * * If the present consolidated school district was legally established (which is the basic allegation of relator's suit), then its dissolution, even if validly decreed, would not, per se, restore the corporate franchises of the previous school districts, nor restore its directors to their former offices and functions. Neither was it within the judicial power of the circuit court, after dissolving the consolidated district, to re-create and restore the former districts or their officers, even if such issue had been within the pleadings, for when the former districts ceased to exist as such, the terrain comprehended within them became a part of the new consolidated districts formed thereof, and upon a valid dissolution of the latter such terrain would become 'unorganized territory' (R. S. 1909, Sec. 10776), and could thereafter be organized into school districts only by the method prescribed in the statute and upon the votes of its inhabitants (R.S. 1909, Sec. 10836). It is clear, therefore, that so much of the judgment of the learned trial court as undertook to reincorporate the former school districts and refunction their officers was outside the issues on trial, as well as outside the pale of judicial authority. So much, therefore, of the decree in the present case as undertook to do this, was a simple nullity."

We believe that in the above case it is indicated that the dissolution of a consolidated school district and the organization of a common school district cannot be accomplished at the same time, and that the organization of common school districts can only be accomplished as prescribed by statute after the unorganized territory is created.

Honorable Robert E. Crist

Moreover, we believe that the matter of dissolving a consolidated school district and the reorganizing of common school districts are two separate propositions. You inquire if they could be submitted at the same election, although you do not state just how this would be done. We do not believe that the two propositions could be united and submitted as one proposition to the voters of the school district inasmuch as such practice has been condemned by the courts in similar elections where this has been done. State ex rel. Pike County v. Gordon, 268 Mo. 321, 188 S.W. 88; State ex rel. City of Joplin v. Wilder, 217 Mo. 261, 116 S.W. 1087.

CONCLUSION

Therefore, it is the opinion of this department that a public meeting must be held to dissolve a consolidated school district wherein the voters and taxpayers residing within the school district vote on the proposition of whether or not the school district should be dissolved.

Further, it is our opinion that the voters and taxpayers of a consolidated school district cannot vote on the proposition of dissolving the school district and the proposition of organizing common school districts within the consolidated school district territory in the same election held at the public meeting.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:ml

MOTOR VEHICLES: Registration-- 1) Operation:

1) Commercial motor vehicles registered for a full year. 2) Weight load change immaterial. 3) Maximum weight load permitted full year. 4) Over maximum weight limit permitted by highway department. 5) Credit to owner for fees paid before if fees increase. 6) Owner may operate vehicle under subsections (8) new law or (10) old law. 7) Farmer may borrow lease or rent licensed vehicle from another farmer for hauling distances over twenty-five miles to farm of operator under Secs. 10 and 19. House Bill No. 283. 8) Resident of Missouri cannot ~~furnish~~ leased vehicle owned and registered outstate, vehicle not being subject of agreement for sale or lease and not in possession of potential mortgagor to operate from Missouri in either interstate or intrastate business on Missouri highways unless vehicle registered in Missouri. Foreign licenses no protection to operator on highways of Missouri.

FILED
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November 10, 1952

11-26-52

Department of Revenue
State of Missouri
Jefferson City, Missouri

Attention: Mr. Olen B. Curtis, Supervisor

Gentlemen:

This will be the opinion you requested from this office on numerous legal questions which may arise in the administration of the terms of Conference Committee Substitute for Amended Senate Committee Substitute for House Bill No. 283, 66th General Assembly, relating to the licensing, taxation and regulation of the operation of motor vehicles in this State. Your letter in this behalf reads as follows:

> "Several questions have come up regarding the administration and the enforcement of differences in requirements of registration of commercial vehicles under the old Statutes and the new law, effective July 29, 1952, as set out in Conference Committee Substitute for Amended Senate Committee Substitute for House Bill No. 283, 66th General Assembly, for which we respectfully request an official opinion to each of the questions listed herein:
>
> > "1. After the effective date of this law, are all commercial motor vehicles required to re-register?
> >
> > "2. Is the owner of a commercial motor vehicle required to re-register said commercial motor vehicle after the effective date of this law providing he continues to haul the same weight load for which the vehicle has been

previously registered for the year 1952?

"3. If an owner purchased 1952 commercial license for over 44,000 pounds under Section 301.060, 1949 Statutes, and this license permitted him to haul up to 56,000 pounds, would this license permit him to haul up to 60,010 pounds after the effective date of this new law?

"4. Several commercial truck owners engaged in heavy hauling purchased truck license for gross weight of 44,000 pounds under the (old law referred to above), expecting to be permitted with special permit issued by the Highway Department, to haul to the limit of the permit, which could be 75,000 pounds to 85,000 pounds on special occasions, without additional fees. Would this practice be permitted under the new schedule of fees as outlined in this House Bill 283, or must he re-register, paying for the maximum allowed under House Bill 283 before being permitted to obtain or operate under special excess weight permit?

"5. When a registrant desires to increase the weight for which the commercial motor vehicle is licensed, may credit be allowed for fees originally paid to (a) Motor Vehicle Registration Department, (b) Public Service Commission

"6. Assuming that commercial motor vehicles registered prior to the effective date of this new law are not required to re-register, will a commercial motor vehicle operator be permitted to operate his vehicle as defined in Section 301.010, sub-paragraph 8, Revised Statutes of 1949, or as defined in Section 301.010, sub-paragraph 9, of House Bill 283?

Department of Revenue:

"7. Does this law permit a farmer to (a) borrow, (b) lease, (c) rent a commercial motor vehicle from another farmer who has local commercial license on his vehicle, for the purpose of hauling property to the farm of the operator, where the haul is for a greater distance than twenty-five miles?

"8. May a Missouri resident lease from an out-state corporation or an individual owner, a motor vehicle owned and registered in the name of the lessor and the vehicle is not the subject of an agreement for conditional sale or lease with the right of purchase, operate this vehicle on the foreign license (1) intra-state, (2) inter-state, without registering it in the State of Missouri?"

Some of the questions submitted in your letter are based upon the further question whether the terms of numbered sections of Chapter 301, RSMo 1949, or the terms of said House Bill No. 283, shall be followed in the administration of the Act by your Department where some vehicles were registered under the old law for a year, and where there is an actual or an apparent conflict between such provisions of the statutes. Chapter 301, RSMo 1949, dealt, as do the provisions of said House Bill No. 283 deal, with licensing and taxing, among other provisions, of motor vehicles used upon the highways of this State, both for passenger and commercial purposes. Your letter indicates that here your Department is more particularly concerned with the questions of registration of commercial motor vehicles and the hauling weights and fees or taxes to be paid for the operation of such vehicles after July 29, 1952, after said House Bill No. 283 goes into effect. Investigation of the effective date of said House Bill No. 283 discloses that this bill was Truly Agreed To and Finally Passed by the 66th General Assembly on March 24, 1952, and that the General Assembly finally adjourned on April 29, 1952. Section 29 of Article III of the Constitution of this State, 1945, provides that no law passed by the General Assembly shall take effect until ninety days after the adjournment of the session at which it was enacted. Such periods of time and provisions, therefore, establish July 29, 1952, as the effective date of said House Bill No. 283.

Department of Revenue:

Section 301.030, RSMo 1949, provided for a system of registration of motor vehicles of all types.

A part of Section 1 of Section 301.030 so providing reads:

> "* * * Commencing July 1, 1949, motor vehicles shall be registered for a period of twelve consecutive calendar months.* * *."

Section 301.030 of House Bill No. 283, makes a distinction in the period of time for which motor vehicles shall be registered according to the type of vehicle. Section 1 of Section 301.030, House Bill No. 283, concerning such registration states, in part:

> "* * * Commencing July 1, 1949, motor vehicles,other than commercial motor vehicles, shall be registered for a period of twelve consecutive months. * * * ."

Section 3 of Section 301.030 of House Bill No. 283, respecting the registration of commercial motor vehicles, in part, reads as follows:

> "All commercial motor vehicles must be registered with the director on a calendar year basis. * * * ."

Sections 301.060 in Chapter 301 and 301.060 in said House Bill No. 283, each, in providing for the registration fee to be paid on motor vehicles refers to the license fee as "annual registration fees." This supports and supplements the quoted text from Section 301.030, RSMo 1949, and the quoted text in Section 3 of Section 301.030 of said House Bill No. 283, supra, as indicating that the Legislature intended in the enactment of such above-quoted provisions, that the registration of motor vehicles shall be for a period of twelve months and on a yearly basis. If then, a commercial vehicle has been registered prior to the effective date of said House Bill No. 283, such commercial motor vehicle may not be required to be re-registered during the period of its existing certificate of registration. We believe the Legislature must have said in express terms that a new registration of such motor vehicles would be required after the effective date of said House Bill No. 283 and within the one year period after the date of the previous registration of such motor vehicle before any such

vehicles may be required to be registered during 1952. The Legislature has not so said. The succinct answer then to question No. 1 is No.

Considering your second question whether the owner of a commercial motor vehicle may be required to re-register such vehicle after the effective date of said House Bill No. 283 providing he continues to haul the same weight of load for which the vehicle has previously been registered for the year 1952, our reply is that, since we have held in our answer to question number one, supra, that a commercial vehicle registered in 1952, prior to the effective date of said House Bill No. 283, is not required to be re-registered during 1952, the operator of such commercial vehicle may continue to haul during 1952 the same weight load for which such vehicle had been previously registered. Our direct answer, therefore, to your question number two is No.

Your third question inquires, if an owner purchased a 1952 commercial vehicle license for over 44,000 pounds under Section 301.060, RSMo 1949, and such license permitted the operator to haul up to 56,000 pounds, may such license permit him to haul up to 60,010 pounds after the effective date of said House Bill No. 283. We see no reason, nor do we find any authority to the contrary, why the operator of such commercial vehicle should not be permitted to haul up to the maximum rate limit, whatever it may be, during 1952, where the operator has registered for the highest weight haul permitted during 1952, and during the full period of his registration license for 1952. There is no provision in Chapter 301, RSMo 1949, or in said House Bill No. 283, preventing the operator from hauling whatever the maximum weight load would be in 1952 where he has previously procured a license for a commercial motor vehicle for the full year of 1952. Our answer, therefore, to your third question is Yes.

You submit in your fourth question the proposition first, whether if, and your letter so indicates that this practice has been followed, some commercial truck owners, engaged in heavy hauling, who have purchased truck licenses under the terms of Chapter 301, RSMo 1949, for gross weight of 44,000 pounds, anticipating that they will be permitted under a special permit from the Highway Department to haul the limit under such special permit which could be 75,000 pounds to 85,000 on special occasions, may be permitted so to do without additional fees, and would this practice be followed under House Bill #283, or must such truck owner re-register and pay for the maximum allowed under House Bill #283 before being permitted to obtain such special excess weight certificate or operate under such permit.

We believe that when a commercial truck license has been

issued to the owner for hauling a gross weight of 44,000 pounds, under the old law for one year, he may be permitted to haul, under a special certificate issued by the official authorized to issue such certificates under Highway Department laws, up to the full limit of such special permits, without such owner and operator being required to re-register such vehicle or before being permitted to obtain and operate such vehicle under such special excess weight permit.

Manifestly, such operator of such commercial truck would be entitled under his license to operate for the full period of a year covered by the license and to haul a gross weight of 44,000 pounds under sub-section (1) of Section 301.060, RSMo 1949, without re-registering after the new law takes effect, Section 304.200 RSMo 1949, authorizes the Chief Engineer of the Highway Department, and in municipalities, certain municipal authorities of this State, to issue special over-weight certificates upon occasion, which said Section 304.200 reads as follows:

> "1. The chief engineer of the state highway department, whenever in his opinion the public safety or public interest so justifies, may issue special permits for vehicles exceeding the limitations on width, length, height and weight herein specified. Such permits shall be issued only for a single trip or for a definite period, not beyond the date of expiration of the vehicle registration and shall designate the highways and bridges which may be used under the authority of such permit.
>
> "2. The officer in charge of the maintenance of the streets of any municipality may issue such permits for the use of the streets by such vehicles within the limits of such municipalities."

This section authorizes the issuance of overweight certificates by such specified officers without regard to the time of the registration of such motor vehicles or the period over which it extends. The special overweight permit may be issued for a definite period not to exceed the expiration date of the registration period expressed in the license.

We believe, therefore, that an owner of a commercial motor vehicle, on occasion may, under a special overweight permit issued by the officer named in said Section 304.200, haul the full weight load specified in such permit without paying additional fees, and that such motor vehicles need not be re-registered under said House

Bill #283 before the owner may obtain such special overweight certificate or operate such motor vehicle thereunder. Our answer, therefore, to the first problem in your fourth question whether the maximum weight limit may be hauled under a special permit by the officers named in Section 304.200, without additional fees, and would this practice be permitted under House Bill No. 283 is Yes.

On the further question whether the owner of such commercial truck must re-register such motor vehicle, paying for the maximum weight allowed under House Bill No. 283 before being permitted to obtain or operate under a special excess weight permit submitted in your fourth question, our answer is No.

Your fifth question asks whether the owner of a commercial vehicle has registered such vehicle for a certain weight and desires to increase the weight load for which the vehicle is licensed may be allowed credit for the amount of the fee originally paid to the Motor Vehicle Registration Department or the Public Service Commission. We are unable to find any statute providing in express terms that such registrant of such commercial motor vehicle is entitled to have credit on the new fee required upon the increase of the weight load he may haul, nor do we find any authority, statutory or otherwise, holding that such registrant may not be entitled to such credit.

The State in the transaction of its business may, and should, transact the State's business with the people in a fair, just and reasonable manner, according to business principles in the same manner and to the same extent that the State expects its citizens to form and carry out their agreements with the State. It may not be contended that a license issued by the State when accepted by the licensee becomes a contract. A license is merely a privilege. But even so, when the licensing authorities issue a license to a licensee to transact business thereunder for a definite fee or tax, and that amount has been paid to the State for the license and later, if and when, the same licensee desires to increase his capacity or the amount of weight to be hauled; under such license, a larger fee or tax is required for the greater weight, fairness and justice would, as a matter of public policy, where it is not prohibited by law, require that such licensee should be entitled as a credit on the larger fee to be paid for the privilege of hauling greater weight by the amount he has paid originally to haul the lesser weight. Such transaction would not constitute a contract, yet it is an undertaking between the State and the licensee, which should be treated and carried out between the State through its authorized officers and the licensee as would any other lawful business transaction by the same rules of fairness and justice which bind individuals. We believe, therefore, that credit should be given by both the Motor

Vehicle Registration Department and the Public Service Commission on larger fees later demanded of a registrant for fees originally paid for a license where an increase of weight or any other condition arises calling for a larger fee to operate such vehicle. Our answer then to your fifth question is Yes.

Your sixth inquiry is, whether a commercial motor vehicle registered prior to July 29, 1952, the effective date of House Bill No. 283, and not required to be re-registered, may be permitted to operate such vehicle as defined in subsection (8) of Section 301.010, RSMo 1949, or as defined in subsection (10) of Section 301.010 of House Bill No. 283.

Said subsections (8) and (10) are both descriptive definitions giving the meaning of "Local commercial motor vehicle."

We believe the operator of a local commercial motor vechicle previously registered should be permitted to operate the vehicle if it comes within the definition given in either of said subsections (8) or (10), noted, and this should be determined as the conditions in each case arise and appear at the time.

Your seventh question is, does House Bill No. 283 permit a farmer to borrow, lease or rent a commercial motor vehicle from another farmer who has a local commercial license for his motor vehicle, for the purpose of hauling property to the farm of the operator where the distance is greater than twenty-five miles.

Section 301.010, the Definition section of Chapter 301 of Missouri Revised Statutes, Cumulative Supplement of 1951, in subsection (10) defines a "Local commercial motor vehicle" as follows:

> "(10) 'Local commercial motor vehicle,' a commercial motor vehicle whose operations are confined solely to a municipality and that area extending not more than twenty-five miles therefrom; or a commercial motor vehicle whose property carrying operations are confined solely to the transportation of property owned by any person who is the owner or operator of such vehicle, to or from a farm owned by such person or under his control by virtue of a landlord and tenant lease; provided that any such property transported to any such farm is for use in the operation of such farm;"

The gist of this question narrows down to the above quoted definition. In the former section of Section 301.010, RSMo 1949, which was subsection (8), the definition was as follows:

> "(d) When controlled or operated by any person principally engaged in farming when used exclusively in the transportation of agricultural products or livestock to or from a farm or farms or in the transportation of supplies to or from a farm or farms;"

The intention of the Legislature seems to us to be clear. The Legislature meant to qualify vehicles of farmers as "local commercial." It is also evident that they intended to continue that qualification into the present law. The change being now that the owner or operator of the vehicle is required to be the owner of the property transported and the property must be used in the operation of the farm. From the way the new statute is drawn, it can therefore be said that it does not permit any farmer to (a) borrow, (b) lease, or (c) rent a commercial motor vehicle from another farmer who has a commercial motor vehicle license on his vehicle for the purpose of hauling property to the farm of the operator. The borrower must further qualify himself by being the owner of the property which he is hauling and he must be the owner or lessor of the farm to or from which he is hauling.

The distance of the haul we believe to be ruled out by the use of the word "or" after a semicolon in subsection (10). From the text it appears that the semicolon prior to the word "or" and the word "or" gives a completely alternative definition of "Local commercial motor vehicle," both as it was arranged in the old Section 301.010, subsection (8), paragraph (d) thereof, and as it is now arranged in the new section.

In Rust v. Missouri Dental Board, 348 Mo. 616, l.c. 627, 155 S.W. (2d) 80, l.c. 85-86, the Court said: "'or' is seldom used in penal statutes other than as a disjunctive. 48 C.J. Sec. 7, P. 1127." We believe that "or" was and is intended as a disjunctive in this statute.

In answer to your seventh question we believe that a farmer may borrow, lease or rent a commercial motor vehicle from another farmer who has a local commercial license on his vehicle, provided that the borrower or lessor is the operator of the vehicle, and subject to the further provisions and qualifications of subsection (10), Section 301.010, Missouri Revised Statutes, Cumulative Supplement, 1951.

Department of Revenue

Your eighth question submits the following: May a Missouri resident lease, from an outstate corporation, or an individual owner, a motor vehicle owned and registered in the name of the lessor, and the vehicle is not the subject of an agreement for conditional sale or lease with the right of purchase, and under the lease operate such vehicle on the foreign license (1) intra-state, (2) interstate, without registering it in the State of Missouri?

We believe the answer to this question is: No.

A Missouri resident, as lessee of a commercial motor vehicle, owned and registered by a corporation or an individual in a foreign state, the vehicle not the subject of an agreement for conditional sale or lease with the right of purchase, and the operator is not entitled to the possession thereof as a mortgagor, has no right whatever to operate such vehicle on the highways of this State without registering the vehicle in this State. In order to do either an interstate or intrastate business with such vehicle, assuming his business is located in Missouri, such lessee must register the vehicle in Missouri. 12 C.J. 103, under the subject of "COMMERCE" states its text in support of this view with the following:

> "In the exercise of its general police power and its power to license occupations and businesses, a state or municipality may impose a license tax for the doing of local or domestic business within its territorial jurisdiction, although the property involved may have come originally from another state, or although a contract relating to the business may have been made in another state or although the person or corporation involved may also be engaged in interstate commerce, or although the business, when carried on wholly within the state, may involve deliveries outside the state. * * *."

Section 301.020, RSMo 1949, is in part as follows:

> "Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state except as herein otherwise expressly provided, shall file, by mail or otherwise, in the office of the director of revenue, an application for registration on a blank to be furnished by the director of revenue for that purpose, containing:"

In the matter of Hendrick v. Maryland, 235 U.S. 610, l.c. 623-624, 59 L. Ed. 385, l.c. 391, the Court said:

> "In view of the many decisions of this court there can be no serious doubt that where a state at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some uniform, fair, and practical standard, they constitute no burden on interstate commerce. * * *"

We do not believe the provision of our statute can be interpreted to interfere with or put an unreasonable burden upon interstate commerce so as to come within any prohibitions of the commerce clause. If such lessee is doing business as a Missouri enterprise, the foreign state license on such vehicle would furnish him no protection whatever in operating a vehicle on the highway of Missouri.

CONCLUSION

It is, therefore, the opinion of this Department, considering the foregoing, that:

1) Commercial motor vehicles previously registered during 1952 are not required to re-register after July 29, 1952, the effective date of the new truck law, House Bill No. 283;

2) The owner of a commercial motor vehicle is not required to re-register said vehicle after the effective date of House Bill No. 283 if he continues to haul the same weight load for which the vehicle has been previously registered for the year 1952;

3) If the owner of a commercial motor vehicle purchased a license for over 44,000 pounds under Section 301.060, RSMo 1949, permitting him to haul up to 56,000 pounds, the maximum weight, he would be permitted under such license to haul up to 60,010 weight load after July 29, 1952, the effective date of the new law, during 1952;

4) Where commercial motor vehicle owners engaged in heavy hauling have purchased a truck license for gross weight of 44,000 pounds under Chapter 301, expecting to be permitted under a special permit issued by the Highway Department to haul to the limit of the permit which could be 75,000 to 85,000 pounds on special occasions, he may do so without paying additional fees. This practice may be

permitted under the new schedule of fees as outlined in House Bill No. 283 without the owner being required to re-register such commercial motor vehicle and without being required to pay for the mzximum weight allowed under House Bill No. 283, beforebeing permitted to obtain such special excess weight permit or to operate thereunder;

5) When a registrant of a commercial motor vehicle desires to increase the weight for which such vehicle is licensed he may be allowed credit on increased license fees for fees originally paid to (a) the Motor Vehicle Registration Department, or (b) the Public Service Commission;

6) An operator of a local commercial motor vehicle previously registered, may operate the vehicle on the highways of this State if it complies with either of said sub-sections (8) or (10) noted, under conditions then and there appearing;

7) A farmer may borrow, lease or rent a commercial motor vehicle from another farmer who has a license for such vehicle for hauling property to the farm of the operator for a greater distance than twenty-five miles, if he qualifies to do so under the terms of Section 10 of House Bill No. 283;

8) A Missouri resident assuming that his business is located in Missouri, may not under a lease of a commercial motor vehicle owned and registered by a corporation or individual in a foreign State, and such vehicle not being the subject of an agreement for conditional sale or lease with the right of puchase, and such lessee not being entitled to the possession thereof, as a mortgagor, do either an interstate or an intrastate business with such vehicle on the highways of this State without registering the vehicle in this State.

Respectfully submitted,

APPROVED:

GEORGE W. CROWLEY
Assistant Attorney General

J. E. TAYLOR
Attorney General

GWC:ir

INTOXICATING LIQUOR:
NONINTOXICATING BEER:

1. Owners and operators of a cafe or club, who are not licensed to sell any kind of liquor, may permit the consumption of 3.2 beer upon premises of the cafe or club by any individual at any time.

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2. Owners and operators of a cafe or club, who are not licensed to sell any kind of liquor, may permit the consumption of intoxicating liquor upon their premises except between the hours of 10 p.m. and 6 a.m.

April 11, 1952

Honorable Bill Davenport
Prosecuting Attorney
Christian County
Ozark, Missouri

4-11-52

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

> "I would now like to make request for an opinion as to whether it is a violation of the law for persons to bring either 3.2 or higher percentage beer into a place not licensed to sell any kind of liquor but operating a cafe and club of sorts. This is in connection with a certain place in my County in which the license to sell 3.2 beer has been revoked by the Liquor Department for a conviction of a violation of the Liquor Control Act and where no other license has been obtained by any other person for the premises."

In your letter you refer to "3.2 or higher percentage beer." We would here point out that 3.2 beer is by Missouri law declared to be nonintoxicating. Paragraph 2 of Section 312.010, RSMo 1949, states:

> "The phrase 'nonintoxicating beer' as used in this chapter shall be construed to refer to and to mean any beer manufactured from pure hops or pure extract of hops, and pure barley malt or other wholesome grains or cereals, and wholesome yeast, and pure water,

> and free from all harmful substances, preservatives and adulterants, and having an alcoholic content of more than one-half of one per cent by volume and not exceeding three and two-tenths per cent by weight."

We would further point out that Missouri law holds that any liquor which contains more than 3.2 per cent of alcohol by weight is intoxicating liquor. Section 311.020, RSMo 1949, states:

> "The term 'intoxicating liquor' as used in this chapter, shall mean and include alcohol for beverage purposes, alcoholic, spirituous, vinous, fermented, malt, or other liquors, or combination of liquors, a part of which is spirituous, vinous, or fermented, and all preparations or mixtures for beverage purposes, containing in excess of three and two-tenths per cent of alcohol by weight."

We will first address ourselves to that part of your question which relates to 3.2 beer. Missouri law (Section 312.030, RSMo 1949) prohibits any person from selling 3.2 beer who has not received a permit to do so. Missouri law (Section 312.400, RSMo 1949) also prohibits any person, even though duly licensed, to sell or supply 3.2 beer to an habitual drunkard, a person who is intoxicated, or to a person under 21 years of age. However, these laws are not applicable to the situation which you present. The "cafe or club" to which you refer would, according to your statement, have nothing whatever to do with the 3.2 beer except to permit individuals who, presumptively, have lawfully acquired it, to consume such beer on the premises of the "cafe or club." We are unable to find anything in Missouri law which would prohibit an individual from allowing it to be done.

We will now consider the matter of a "cafe or club" permitting the consumption on its premises of beer which has a higher percentage of alcohol by weight than 3.2 per cent, which is to say, intoxicating liquor. Paragraph 1 of Section 311.480, RSMo 1949, states:

> "It shall be unlawful for any person operating any premises where food, beverages or entertainment are sold or provided for

> compensation, who does not possess a license for the sale of intoxicating liquor, to permit the drinking or consumption of intoxicating liquor in, on or about said premises between ten P.M. and six A.M. the following day, without having a license as in this section provided."

Here, we would point out that the quoted portion of Section 311.480 covers and embraces the type of "cafe or club" which you describe to us, to-wit, a place which furnishes food or entertainment or both, but which does not possess a license to sell intoxicating liquor. We would point out further that since the above quoted portion of Section 311.480 only prohibits the consumption of intoxicating liquor upon the premises between the hours of 10 p.m. and 6 a.m., that such consumption between the hours of 6 a.m. and 10 p.m. is not prohibited and is therefore legal.

CONCLUSION

It, therefore, is the opinion of this department that:

1. The owners and operators of a cafe or club, who are not licensed to sell any kind of liquor, may permit the consumption of 3.2 beer upon premises of the cafe or club by any individual at any time.

2. Owners and operators of a cafe or club who are not licensed to sell any kind of liquor, may permit the consumption of intoxicating liquor upon their premises except between the hours of 10 p.m. and 6 a.m.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HPWab

MOTOR VEHICLES:
COLLECTOR:

Under House Bill 211 a person who owns personal property which is not assessed is entitled to a certificate that no taxes are due.

FILED
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June 30, 1952

Honorable Dick B. Dale, Jr.,
Prosecuting Attorney of
Ray County
Richmond, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this department which request reads in part as follows:

> "I hereby respectfully request an official opinion from your Office concerning House Bill 211, which became effective April 22, 1952, and reads in part as follows:
>
> "'Section 1. No state registration license to operate any motor vehicle in this State shall be issued unless the application for license is accompanied by a tax receipt or a statement certified by the county or township collector of the county or township in which the applicant's property was assessed showing that the state and county tangible personal property taxes for the preceding year have been paid by the applicant or that no such taxes are due.'
>
> "'Section 2. Every County and Township Collector shall give each person a tax receipt or a certified statement of tangible personal property taxes paid. Where no such taxes are due each such

> collector shall, upon request, certify such fact and transmit such statement to the person making the request. The director of revenue shall make necessary rules and regulations for the enforcement of this act, and shall design all necessary forms.'
>
> * * * * * * * * * * * * *
>
> "The question for which I am requesting an opinion is, Which of the above three designated forms is the County Collector to give the applicant when the applicant was a resident of the County and an owner of an automobile on January 1, 1951, but where the assessor's office did not assess the automobile?"
>
> * * * * * * * * * * * * *

In a case such as you have mentioned, where a person owned personal property on January 1, 1951, but was not assessed, nor taxes paid, the county collector under Section 2, House Bill 211, could not issue a tax receipt or a certified statement of personal property taxes paid. The question then is whether a collector should issue a certificate that no taxes are due to a person who wishes to make application for a motor vehicle registration license.

We are of the opinion that a collector, under the provisions of House Bill 211, Section 2, should issue upon request a certified statement that no taxes are due since the basis of any tax is a valid assessment.

The General Rule in this regard is stated in 51 Am. Jur., Taxation, Section 647, page 614, as follows:

> "It seems hardly necessary to cite authorities to support the proposition that in order to have a valid tax there must be a levy of taxes and an assessment.
>
> * * * * * * * * * * * * * * * * *
>
> "While strictly speaking, the 'assessment' of a tax is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district, the word as commonly employed refers to the processes of

> listing the persons, property, etc., to be taxed, and the valuation of the property. A valid assessment is undoubtedly indispensable to the levy of a tax."

This rule has been followed by the Supreme Court of Missouri in the case of State ex rel. Kansas City Power and Light Company v. Smith, 342 Mo. 75, wherein the court said at l.c. 78:

> "'Under our system of taxation there can be no lawful collection of a tax until there is a lawful assessment and there can be no lawful assessment except in the manner prescribed by law and of property designated by law for that purpose.' (Italics ours.) (State ex rel. Koeln v. Lesser, 237 Mo. 310, l.c. 318, 141 S.W. 888.)"

See also State ex rel. v. Lesser, 237 Mo. 310, l. c.,318. State ex rel. Haferty v. Kansas City Power and Light Company, 346 Mo. 1069, l.c. 1077.

Since the applicant for a certificate from the collector was not assessed, his name will not be carried in the collector's books and therefore, no tax is due. The only duty of the collector is to collect such taxes as are listed in the tax books as delivered to him and he has no authority to make an entry in the tax book and demand such tax prior to issuing a certificate.

We would like here to point out that House Bill No. 211 applies to all personal taxes and not merely taxes upon an automobile.

CONCLUSION

Therefore, it is the opinion of this department that where a person owns personal property on January 1, 1951, which is not assessed and carried on the tax books delivered to the collector such person is entitled, under the provisions of House Bill No. 211, 66th General Assembly, upon request, to a certified statement from the collector that no taxes are due, since the liability for such taxes is based upon a valid assessment.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CRIMINAL COSTS: BOARD OF MATERIAL WITNESSES: HOW TAXED IN THIRD OR FOURTH CLASS COUNTIES:

In third or fourth class county when examining magistrate in felony case binds defendant over for trial in circuit court and commits material witnesses to jail in default of required recognizance, and defendant is convicted and sentenced to penitentiary; county, and not state liable to reimburse sheriff for board bill.

October 27, 1952 10-28-52

FILED
21

Honorable Dick B. Dale, Jr.,
Prosecuting Attorney of
Ray County
Richmond, Missouri

Dear Sir:

Your request for a legal opinion of this department has been received, and reads in part as follows:

> "Whether the State or the County shall pay the board bill of material witnesses in a felony case in which the Defendant entered a plea of guilty and was sentenced to the State Penitentiary at Jefferson City, Missouri?"

The facts upon which this inquiry is based are these:

A first degree murder charge was filed before a magistrate of Ray County, Missouri, against one R, who was bound over on said charge for trial at the next term of circuit court, M, C and W, were material witnesses for the state and were required by the examining magistrate to enter into a five hundred dollar recognizance for their attendance as witnesses at the trial of the case in circuit court. Upon their failure or refusal to give the recognizance in the required amount, each of said witnesses was committed to the county jail by the magistrate where he remained for a period of fifty-two days and until the case was disposed of in circuit court.

The case was disposed of when the charge in the information was reduced from first degree murder to manslaughter, to which the defendant entered a plea of guilty and the court sentenced defendant to a term of five years in the State Penitentiary.

It is for the board bill of the above mentioned witnesses while confined in the Ray County jail that the present inquiry as to whether the state or county should reimburse the sheriff has arisen.

Under the provisions of Section 544.420, RSMo 1949, if the examining magistrate in a preliminary hearing is convinced that a felony has been committed, and there is probable cause to believe the prisoner before him is guilty it shall be the duty of said magistrate to bind said prisoner over for trial in the circuit or other court of the county having cognizance of the offense and also to bind the prosecutor and all material witnesses against such prisoner by recognizance to appear and testify at the trial of the case.

Section 544.440, RSMo 1949, in effect provides that when any witness required to enter into recognizance fails or refuses to do so he may be committed to prison until he shall comply with the court's order, or be otherwise discharged according to law.

Ray County is a county of the third class and is governed by the provisions of Section 221.090, RSMo 1949, relating to the method for payment of the expense of boarding prisoners in third and fourth class counties. Said section reads as follows:

> "1. In each county of the third or fourth class, the sheriff shall furnish wholesome food to each prisoner confined in the county jail. At the end of each month, he shall submit to the county court a statement supported by his affidavit, of the actual cost incurred by him in the boarding of prisoners, together with the names of the prisoners, and the number of days each spent in jail. The county court shall audit the statement and draw a warrant on the county treasury payable to the sheriff for the actual and necessary cost.
>
> "2. When the final determination of any criminal prosecution in a county of the third or fourth class shall be such as to render the state liable for costs under existing laws, it shall be the duty of the county clerk to certify to the clerk of the circuit court or court of common pleas in which the case was determined, the amount due the county for boarding any

> prisoner who was a party in such case. It shall then be the duty of the clerk of the court in which the case was determined to include in the bill of costs against the state, all fees which are properly chargeable to the state for the board of such prisoners."

It is noted that under paragraph 1 of this section it is the duty of the sheriff of a third or fourth class county to furnish board for each prisoner confined in the county jail, and that at the end of the month he is to be reimbursed for the actual and necessary cost of the board by the county in the manner provided by the section. This section is broad enough in meaning to allow reimbursement to the sheriff for the board of each prisoner legally committed to said jail, without regard to the particular reason for the confinement.

Paragraph 2 of this section in effect provides that upon the final determination of a criminal prosecution in which the state becomes liable for the costs it becomes the duty of the county clerk to certify to the clerk of the circuit court or other court in which the case was tried the amount due the county for the board of "any prisoner who was a party in such case" and further provides that the clerk of the trial court shall include the amount of such board in the cost bill against the state when such cost bill is properly chargeable against the state.

As to when the costs of a criminal case are liable to be paid by the state one must look to Section 550.020, RSMo 1949, which reads as follows:

> "1. In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except, costs, incurred on behalf of defendant.
>
> "2. And in all cases of felony, when the jury are not permitted to separate, it shall be the duty of the sheriff in charge of the jury, unless otherwise ordered by the court, to supply them with board and lodging during the time they are required by the court to be kept together, for

> which a reasonable compensation may be allowed, not to exceed three dollars and fifty cents per day for each member of the jury and the officer in charge; and the same shall be taxed as other costs in the case, and the state shall pay such costs, unless in the event of conviction, the same can be made out of the defendant."

This section provides that when the defendant is convicted he shall pay the costs of the case except in those instances when he is unable to do so and the punishment was fixed at a term in the penitentiary; then the costs shall be paid by the state except costs incurred on behalf of the defendant.

When this section is read in connection with paragraph 2, of Section 221.090, supra, it is apparent that the words "any prisoner who was a party in such case," can refer only to a defendant convicted of a criminal offense, whose punishment was fixed at not less than a term in the state penitentiary.

The three persons referred to above were committed to the county jail upon their failure to give recognizance for their attendance as witnesses in the case against R, pending in the circuit court, and they were witnesses and not co-defendants with R in said case. It is therefore our thought that even though the State of Missouri may be liable for the payment of the costs in R's case, Ray County, and not the State of Missouri will be liable for reimbursement to the sheriff of said county for the amount expended by him for the board of the prisoner-witnesses, since said witnesses were not "any prisoners who were parties in such case," within the meaning of paragraph 2, Section 221.090, supra.

CONCLUSION

It is the opinion of this department that in a third or fourth class county when the examining magistrate in a felony case binds the defendant over for trial in circuit court and commits material witnesses to the county jail upon their failure to furnish recognizance in the required sum for their attendance as witnesses at the trial, and said case is subsequently disposed of upon the conviction and sentencing

Honorable Dick B. Dale, Jr.,

of defendant to a term in the state penitentiary; that the county in which said case originated is liable for reimbursement of the board bill to the sheriff of said county.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:

J. E. TAYLOR
ATTORNEY GENERAL

PNC:hr

SHERIFFS: Under Section 57.430, RSMo 1949, as repealed and reenacted by House Bill No. 100, 66th General Assembly, sheriffs and also their deputies in counties of the third class are contemplated within the provisions of the section authorizing special allowance for expense of investigations of persons accused of or charged with criminal offense; such investigations/to be limited to the confines of the county.
not

February 11, 1952

FILED
22

2-14-52

Honorable Robert A. Dempster
Prosecuting Attorney
Scott County
Sikeston, Missouri

Dear Mr. Dempster:

The following opinion is rendered in reply to your recent request reading as follows:

> "We would like your opinion upon the following two questions submitted concerning Section 57.430 Vernon's Annotated Missouri Statutes 1951 (laws 1951, p. __, H.B. No. 100, Section 1).
>
> "1. Is the additional salary allowance provided by Section 57.430, aforesaid, to be allowed by the County Court to the Sheriff and to each of his Deputies in the amount of $75.00 each, each month, assuming that the Sheriff and each of his Deputies shall qualify each month for the maximum amount allowed by the statutes?
>
> "2. May a Sheriff or a Deputy Sheriff claim under Section 57.430, aforesaid, actual expenses in the performance of his official duties in connection with the investigation of persons accused or convicted of a criminal offense when such Sheriff or Deputy travels beyond the limits of his county?"

Investigation discloses that Scott County is a county of the third class with a population of 30,000 or more and Section 57.390, RSMo 1949, fixes the sheriff's salary of such county in the following language:

> "The sheriff in counties of the third class shall receive annually for his official services in connection with the investigation, arrest, prosecution, custody, care, feeding, commitment and transportation of persons accused of or convicted of a criminal offense, the following sums: * * *; and in counties having a population of thirty thousand and more, the sum of two thousand eight hundred dollars."

The appointment of deputy sheriffs in counties of the third class is covered by Section 57.250, RSMo 1949, which provides as follows:

> "The sheriff in counties of the third and fourth classes shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the judge of the circuit court, as such judge shall deem necessary for the prompt and proper discharge of his duties relative to the enforcement of the criminal law of this state. The judge of the circuit court, in his order permitting the sheriff to appoint deputies or assistants, shall fix the compensation of such deputies or assistants. The circuit judge shall annually, and oftener if necessary, review his order fixing the number and compensation of the deputies and assistants and in setting such number and compensation shall have due regard for the financial condition of the county. Each such order shall be entered of record and a certified copy thereof shall be filed in the office of the county clerk. The sheriff may at any time discharge any deputy or assistant and may regulate the time of his or her employment."

Powers of deputy sheriffs are described in the following language found at Section 57.270, RSMo 1949, which provides as follows:

"Every deputy sheriff shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff."

Section 57.430, RSMo 1949, as repealed and reenacted by House Bill No. 100, of the 66th General Assembly, provides as follows:

"In addition to the salary provided in Sections 57.390 and 57.400, the county court shall allow the sheriffs and their deputies, payable at the end of each month out of the county treasury, actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed seven cents per mile, and actual expenses not to exceed seven cents per mile for each mile traveled, the maximum amount allowable to be seventy-five dollars during any one calendar month in the performance of their official duties in connection with the investigation of persons accused of or convicted of a criminal offense. When mileage is allowed, it shall be computed from the place where court is usually held, and when court is usually held at one or more places, such mileage shall be computed from the place from which the sheriff or deputy sheriff travels in performing any service. When two or more persons who are summoned, subpoenaed, or served with any process, writ, or notice, in the same action, live in the same general direction, mileage shall be allowed only for summoning, subpoenaing or serving of the most remote. At the end of each month, the sheriff and each deputy shall file with the county court an accurate and itemized statement, in writing, showing in detail the miles traveled by such officer, the date of each trip, the nature of the business engaged in during each trip, and the places to and from which he has traveled. Such statement shall be signed by the officer making claim for reimbursement, verified by his affidavit, and filed by him with the county court. Whenever

> claim for reimbursement is made by a deputy, his statement shall also be approved in writing by the sheriff. The county court shall examine every claim filed for reimbursement, and if found correct, the county shall pay to the officer entitled thereto, the amount found due as mileage."

A close reading of Section 57.430, RSMo 1949, as repealed and reenacted, discloses that not only sheriffs but their deputies are specifically mentioned; that each is to be allowed the actual and necessary expenses for each mile traveled in serving warrants or any other criminal process in an amount not to exceed seven cents per mile; that an additional allowance not connected with the duties of serving warrants or any other criminal process is to be made to the sheriff and his deputies for actual expenses not to exceed seven cents per mile for each mile traveled in the performance of their official duties in connection with the investigation of persons accused of or convicted of a criminal offense; that the actual expenses allowable for purely investigation duties referred to in the statute is not to exceed in any one calendar month the sum of $75.00; that the sheriff and each deputy is required to file with the county court an accurate and itemized statement, in writing, showing in detail the source of such actual expense and such statement must be signed by the officer claiming such reimbursement and must be verified; and any claim made by a deputy must be approved by the sheriff in writing.

We are unable to discover any restrictive language in this statute which would restrict the allowance as fully described in Section 57.430, RSMo 1949, as repealed and reenacted, to the sheriff, and not extend the same to his lawfully appointed deputies. The language of the statute as now written clearly contemplates that deputies are within its provisions since it places specific duties upon such deputies in respect to their claims under the statute.

The last question posed in the opinion request relates to allowances described in Section 57.430, RSMo 1949, as repealed and reenacted, for investigation work by sheriffs and their deputies, such work being apart from the service of warrants and criminal process. The question to be decided is whether such an allowance may be made to a sheriff and his deputies for expenses incurred by such officers in investigation work carried on beyond the limits of the county.

No language is discovered in the section which would restrict the allowance of expense for investigations to those conducted solely within the county in which the sheriff is elected. The importance of this investigation work is not to be minimized and if a sheriff or his deputy determines that a proper functioning of his office requires him to conduct his investigations beyond the confines of the county, we find no prohibition against allowing him reimburseement for expenses so incurred and we deem it allowable under the statute being construed.

CONCLUSION

It is the opinion of this office that Section 57.430, RSMo 1949, as repealed and reenacted by House Bill No. 100, of the 66th General Assembly allows sheriffs, as well as their lawfully appointed deputies in counties of the third class, actual expense within the maximum amount of seventy-five dollars per month for investigation of persons accused of or convicted of a criminal offense, and such allowance may be made to cover expense of such investigations made by a sheriff or his deputies outside the limits of the county in which the sheriff was elected.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:ba

ELECTIONS:

A party primary ballot need not contain the name of an office where no one has filed a declaration seeking the party primary.

May 23, 1952

5-23-52

FILED
22

Honorable Robert A. Dempster
Prosecuting Attorney of Scott County
Sikeston, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this department. Your request reads in part as follows:

> "Mr. Harry C. Watkins, Jr., County Clerk of Scott County, has asked me to write you about the following problem. In our County, no one filed for the Republican nomination for two offices, Prosecuting Attorney and Surveyor. In printing the ballots, it will not be necessary, in fact impossible, to print the name of a candidate for such nomination. The question is, will it be necessary to print such office on the ballot, on the Republican side? Or, to state it another way, can that printing expense be saved by not printing such office on the Republican ticket? Also, this further question, about the same thing, will it be necessary to print such office on the ballot for the general election, since no Republican will be nominated for such two offices? My first question concerns the primary ballot."

You state that no one filed a declaration of candidacy seeking the Republican nomination for the offices of prosecuting attorney and surveyor of Scott County, and inquire whether

or not these two offices must be printed on the Republican primary ballot.

The primary election was unknown at common law and is governed solely by applicable constitutional and statutory provisions. The laws relating to primary elections in this state are contained in Sections 120.300 to 120.650, RSMo 1949. The purpose of such laws is to allow the voters of a political party to choose their candidates and to give a completely free and open opportunity to anyone who wants to be a candidate for office. 29 C.J.S., Sec. 111. State ex rel. Gipe v. Nelson, 358 Mo. 164. Section 120.300 provides for the nomination of candidates by primary election as follows:

> "Hereafter, except as otherwise provided by law, all candidates for elective offices shall be nominated by a primary election held in accordance with sections 120.300 to 120.650. Sections 120.300 to 120.650 shall not apply to special elections to fill vacancies, nor to county superintendents of schools, to city officers not elected at a general state election, to town, village or school district officers."

Section 120.340, RSMo 1949, provides that a person seeking nomination must file a declaration of candidacy. Said section reads in part as follows:

> "The name of no candidate shall be printed upon any official ballot at any primary election unless such candidate has on or before the last Tuesday of April preceding such primary filed a written declaration, as provided in sections 120.300 to 120.650, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form: * * * ."

Section 120.420 provides that the names of all candidates who have filed declaration papers shall be printed on the ballot as follows:

> "An official ballot shall be printed and provided for use at each voting precinct in the form provided herein. The names

> of all the candidates for the respective offices, who shall have filed declaration papers as in sections 120.300 to 120.650 prescribed, shall be printed thereon."

Section 120.450 prescribes the form of the ballot as follows:

> "At all primaries there shall be as many separate tickets as there are parties entitled to participate in the primary election. There shall also be a nonpartisan ticket upon which, under appropriate title of each office, shall be printed the names of all persons by whom declaration papers have been filed, as required by sections 120.300 to 120.650, who do not announce by such declaration papers as candidates for any political party as defined by sections 120.300 to 120.650. The names of all candidates shall be arranged under the appropriate title of the respective offices and under the proper party designation upon the party ticket or upon the nonpartisan ticket, as the case may be. The names of the candidates for each office shall be alternated on the ballots used in the several election districts or precincts so that each name shall appear thereon substantially an equal number of times at the top, at the bottom and in each intermediate place, if any, or the lists or groups of names in which such candidate's name belongs. The names of the candidates shall be printed, and at the left of the name of each candidate, at the beginning of each line upon which the candidate's name is printed, a small square shall be printed, the sides of which shall be not less than one-fourth of an inch in length. The title of the office and the name of all candidates for that office shall be separated from the title of the following office and group of candidates by a line not to exceed four points in width. At primary elections at which committeemen or committeewomen of any party are to be elected, in addition to the names of candidates for offices printed on the ballot, there shall be printed thereon at least one blank line with a square to the

> left of the same, as herein specified, for the purpose of allowing the voter to write in the name of his choice for office. As nearly as practicable, the ballot shall be in the form described in sections 111.420 and 111.430. At the head of each such ticket, immediately following the date of such election, shall be printed the following: 'Instruction to voters: Place an X in the square opposite the name of the person for whom you wish to vote.' * * *."

We do not believe that the foregoing cited provisions require that the name of an office to be filled at the general election be printed on the party primary ballot where no candidate has filed seeking the nomination of that party. As was stated supra, we believe the purpose of the primary law is to allow each party to select their candidate for the particular office and that if, in fact, no person has filed seeking that party's nomination, then such party is precluded from participating in the primary election in regard to that office.

I am enclosing a copy of an opinion of this department to the Honorable H. D. Allison, County Clerk of Buchanan County, August 10, 1938, holding that a person may not be nominated in the general election by write-in votes where such person has not filed declaration papers.

You next inquire whether it is necessary to print the name of an office on a party general election ballot where no one has been nominated for the office. In answer to this question, I am enclosing a copy of an opinion to the Honorable Arthur U. Goodman, Jr., Prosecuting Attorney of Dunklin County, September 23, 1944, holding that the ballot of a political party to be used in the general election shall contain the name of an office to be filled although no person has been nominated for the office.

Honorable Robert A. Dempster

CONCLUSION

Therefore, it is the opinion of this department that "a party primary ballot need not contain the name of an office where no one has filed a declaration seeking the party nomination."

We are further of the opinion, that the official ballot to be used at the general election shall contain a space for the office of prosecuting attorney and surveyor.

Respectfully submitted,

DONAL D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DDG:lw

COUNTY COURTS:
DRAINAGE DISTRICTS:

County court cannot purchase machinery for maintaining ditches, drains and levees in only part of the districts of the county under Section 243.330, RSMo 1949.

September 22, 1952

FILED
22

9/23/52

Honorable Robert A. Dempster
Prosecuting Attorney of
Scott County
Benton, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads as follows:

> "The County Court of Scott County, Missouri, which is the governing body of all the drainage districts in Scott County, has asked this office to write you for an opinion on the question hereinafter set out.
>
> "In connection therewith the following information is given: There are seven drainage districts organized by the county court in Scott County. In four of these districts, more than 50% of the benefited acreage has asked the county court to purchase one drag line machine for these four districts. The other districts have not asked for, and indications are that they do not want to participate in the purchase of a drag line. The county court feels and would do find that the ditches in the four participating districts can be better maintained, more economically and in general that the four districts desiring participation in the drag line can best be served from the standpoint of economy and efficiency in the drag line is purchased for the four districts than contracting the work done.

> "The question is: Can the county court, for and on behalf of fewer than all county court drainage districts in the county, at the request of a majority of the acreage in the petitioning districts, purchase a drag line machine for such petitioning districts alone?
>
> "Reference is made to Section 243,330 VAMS providing method for purchase of equipment for all districts, and Section 243.280 authorizing lease of equipment, and Section 243,240, placing the duty on the county court to maintain the efficiency of the ditches and vesting power and duty of maintaining, preserving, restoring, repairing, strengthening and replacing the ditches, etc.
>
> "Under the last cited section the duty of constantly maintaining, etc., of ditches is cast upon the court and the cost of continually contracting such work is prohibitive, whereas with machinery owned by the district, cost could be kept down and ditches maintained more efficiently."

We presume from your opinion request that the drainage districts to which you refer are districts organized in the county court and this opinion is, of course, so limited.

You inquire whether or not the county court is authorized to purchase machinery for maintaining ditches, drains and levees in some of the drainage districts in the county but not for others. Under the provisions of Section 243.240, RSMo 1949, drainage districts organized under the provisions of this chapter are under the continuous management and control of the county court. Said section provides in part as follows:

> "1. It shall be the duty of the several county courts of this state to maintain the efficiency of the drainage districts now or hereafter organized and existing under and by virtue of the provisions of this chapter and such courts are vested with the continuous management and control of said districts with the duty and power of maintaining, preserving, restoring, repairing, strengthening and replacing the drains, ditches and levees thereof."

* * * * * * * * * * * * * *

Section 243.330, RSMo 1949, authorizes the county court to purchase machinery to be used in the maintenance and preservation of the ditches, drains and levees of the districts in the county. This section provides in part as follows:

> "* * *provided, however, the court may, from time to time, as occasion may require, set aside a portion of said tax from each district in said county into a general fund to be used by the county court in the purchase of dredge boats, tools and other machinery to be used in the maintenance and preservation of the ditches, drains and levees of the districts organized and existing under the provisions of this chapter; provided, the portion appropriated from each district to be used in the purchase of dredge boats, tools and other machinery, shall be determined by dividing into two equal parts the estimated cost of the dredge boats, tools and other machinery purchased; and one such part shall be apportioned in the ratio that the total benefit assessments in each district assessed for original construction bears to the aggregate total assessed benefits for original construction in all said districts, and the other part thereof shall be apportioned to the ratio that the total yards of excavation, or yardage moved, as the case may be, in constructing the original improvement in each district bears to the total yards of excavation of yards moved in constructing original improvements of all said districts.
>
> "3. The dredge boats, tools and other machinery so purchased, shall be and become, the general property of all the drainage districts in said county, and be used under the direction of the county court in the cleaning and restoration of any such ditch, drain or levee in said county to its original size and condition; * * *."

It is noted that this section provides that the county court may set aside a portion of the tax therein provided from each district in the county for the purchase of machinery for the maintenance and preservation of the ditches, drains and levees of the districts. This section further provides that the machinery so purchased shall be and become the general property of all the drainage districts in said county. We are of the opinion that the intention of the legislature is affirmatively stated in this section

and would preclude any other interpretation. This rule is stated in the case of Kroger Grocery & Baking Co. v. City of St. Louis, 435, l.c. 439, as follows:

> "* * *when special powers are conferred, or special methods are prescribed for the exercise of a power, the exercise of such power is within the maxim expressio unius est exclusio alterius, and 'forbids and nugatory the doing of the thing specified, except in the particular way pointed out,' * * *."

Following the above cited rule we believe that since the legislature has provided for the purchase of machinery which shall be and become the general property of all of the districts and since we are unable to find authorization for the purchase of machinery in the manner that you have indicated that it could not be done.

CONCLUSION

Therefore, it is the opinion of this office that Section 243.330, RSMo 1949, provides the only method for the purchase of machinery for drainage districts organized under the provisions of Chapter 243, and if such machinery is purchased as herein provided it becomes the general property of all such drainage districts in the county, and all of said districts may participate in the use thereof within the discretion of the county court subject to the rental and lease provisions contained in this chapter.

Respectfully submitted,

D. D. GUFFEY, Assistant
Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DDG:hr

FIRST CLASS COUNTIES:
SEWER DISTRICTS:

Sewer districts formed in St. Louis County should be formed according to the provisions of Sections 249.430-249.660, inclusive, RSMo 1949.

FILED
22

November 5, 1952 11-6-52

Honorable C. W. Detjen
Assistant County Counselor
St. Louis County Law Department
Courthouse
Clayton, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

> "Hon. John J. McAtee, County Counselor of St. Louis County, has asked me to write to you for an opinion as to whether the provisions of Chapter 249, R. S. Mo. 1949, Sections 249.010-Section 249.420, relating to sewer districts in counties having less than 400,000 inhabitants, and Sections 249.430-Section 249.660, relating to sewer districts in counties having more than 400,000 inhabitants and less than 700,000 inhabitants, are (or either of them) effective so far as the creation of new sewer districts in St. Louis County is concerned.
>
> "When enacted, Sections 249.010-Section 249.420 applied to St. Louis County, and Sections 249.430-Section 249.660 applied to Jackson County, but St. Louis County now has a population in excess of 400,000, according to the 1950 Federal Census. There are, of course, a number of sewer districts in existence in St. Louis County which were formed under the first mentioned statutes and we assume that they will continue to be governed by the provisions of those statutes, so long as they are not repealed by the legislature.

> "In the future, however, if the statutes are still in effect, we assume that sewer districts in St. Louis County would have to be formed under the provisions of Sections 249.430-Section 249.660.
>
> "The question as to whether either of the sewer district laws is still in effect, at least so far as the creation of new districts is concerned, involves construction of Article VI, Section 8 of the Constitution of Missouri, which provides that counties shall be organized and classified by General Laws; the number of classes not to exceed four, and the organization and powers of each class to be defined by General Laws, so that all counties in the same class shall possess the same powers and be subject to the same restrictions. The Section further provides that a law applicable to any county shall apply to all counties in the class to which such county belongs.
>
> "If these sewer district statutes may be considered as statutes relating to the organization and powers of the county, it would seem that they are no longer in effect in view of the legislature's failure to amend them to apply to First Class Counties.
>
> "Will you kindly let us have your opinion as to the extent these two laws are applicable to St. Louis County at the present time, if at all?"

Your request embodies two questions, the first of which is the applicability of certain statutes to the construction of sewers in St. Louis County; the second of which is the constitutionality of the aforesaid statutes.

In regard to your first question, it would seem to be clear that any sewer districts which are, in the future, formed by the County Court in St. Louis County, would have to be formed under Sections 249.430-249.660, inclusive, RSMo 1949.

Section 249.440, RSMo 1949, states that it and ensuing sections are applicable to counties which have a population of not less than 400,000 and not more than 700,000. In your letter you inform us that St. Louis County has a population of more than 400,000. We take judicial notice of the fact that St. Louis County does not have a population exceeding 700,000. Therefore, it is apparent that St. Louis County comes within the purview of Sections 249.430, et seq., supra.

We now face the problem of whether the sections above referred to are valid since the effectuation of the new Constitution of Missouri on July 1, 1946. If they are invalid, it is because Section 249.440 sets up a county classification contrary to Section 8, of Article VI, of the New Constitution of Missouri.

Section 249.440, RSMo 1949, states:

> "The county court in any county in this state now having or which may hereafter have a population of not less than four hundred thousand inhabitants nor more than seven hundred thousand inhabitants, in which is located an unincorporated village or residence district in which main and submain sewers have already been constructed or hereafter may be constructed or deemed necessary, shall have power to establish sewer districts, and to provide for the construction of sewers therein, and to pay the costs thereof by levying special assessments against the lots, tracts or parcels of ground in said sewer districts, and to issue special tax bills evidencing such assessments."

Section 8, of Article VI, of the New Constitution of Missouri states:

> "Classification of counties-uniform laws.- Provision shall be made by general laws for the organization and classification of counties except as provided in this Constitution. The number of classes shall

> not exceed four, and the organization and powers of each class shall be defined by general laws so that all counties within the same class shall possess the same powers and be subject to the same restrictions. A law applicable to any county shall apply to all counties in the class to which such county belongs."

In order to conform the law of this state to the provisions of Section 8, of Article VI, of the Constitution of 1945, the General Assembly of Missouri enacted Committee Substitute for House Bill No. 476, Section 1, (now Section 48.020, RSMo 1949) which reads:

> "All counties of this state are hereby classified, for the purpose of establishing organization and powers in accordance with the provisions of section 8, article VI, Constitution of Missouri, into four classes as follows:
>
> "Class 1. All counties now having or which may hereafter have an assessed valuation of three hundred million dollars and over shall be in the first class.
>
> "Class 2. All counties now having or which may hereafter have an assessed valuation of fifty million dollars and less than three hundred million dollars shall be in the second class.
>
> "Class 3. All counties now having or which may hereafter have an assessed valuation of ten million dollars and less than fifty million dollars shall be in the third class.
>
> "Class 4. All counties now having or which may hereafter have an assessed valuation of less than ten million dollars shall be in the fourth class."

The above section, it will be noted, sets up four classifications of counties. This is in harmony with Section 8, of Article VI, of the New Constitution of Missouri, which states that "The number of classes (of counties) shall not exceed four." It will be noted further that Section 48.020, supra, classifies counties on the basis of their assessed valuation. It will be recalled that Section 249.440, supra, gives certain powers, in regard to the establishment of sewer districts, to the county courts of counties having not less than 400,000 population and not more than 700,000 population. The situation thus presented is that Section 48.020, supra, classifies counties into four classes on the basis of assessed valuation, and that Section 249.440, supra, delegates to certain counties, on a population basis, certain powers. This gives rise to two questions, one of which is: Does Section 249.440, supra, establish a fifth class of counties, in contravention of Section 8, of Article VI, of the New Constitution of Missouri, which states that there shall be only four classes of counties, and of Section 48.020, supra, which has set up four classes of counties on an assessed valuation basis; and second: Does Section 249.440, supra, contravene Section 8, of Article VI, of the New Constitution of Missouri, in that it is a special law rather than a general law, which Section 8, of Article VI, of the New Constitution of Missouri, declares shall apply to all counties in a single class.

In regard to this matter, we invite your attention to the case of State v. Kiburz, 208 S.W. (2d) 285, a case decided by the Missouri Supreme Court in December, 1947. This case was a quo warranto proceeding to determine the right of respondent Kiburz to hold the office of Highway Engineer of St. Louis County. At l.c. 287, et seq., of its opinion, the Court stated:

> "Sec. 8, Art. VI of the 1945 Constitution introduced into the organic law a new requirement with respect to legislation governing the structure of county government, and so necessitated a general overhauling of the whole body of statute law concerning that subject, for absent classification of counties (and none existed theretofore within the meaning of this constitutional provision), there could be no valid legislation governing their organization and powers, subsequent to July 1, 1946. In obedience to this

constitutional mandate, the 63rd General Assembly enacted Committee Substitute for House Bill 476, effective December 5, 1945, because of an emergency clause, which classified all of the counties of the state into four classes, basing the same on assessed valuation, and declaring such classification to be 'the foundation upon which the whole structure of county government and laws relating thereto rests.' Laws 1945, p. 1801, Mo. R.S.A. Sec. 13699.1 et seq. St. Louis County, by virtue of having an assessed valuation of three hundred million dollars, or over, as specified by Sec. 1 of the act just mentioned, concededly belongs in 'Class 1' thus created.

"(1,2) The second proviso to Sec. 8660 was in the nature of a limitation upon the power conferred upon the county court under Sec. 8655. Its object was to except something out of the terms of that grant of power. A proviso can have no existence apart from the provision it is designed to limit or qualify. So, even assuming that the later enacted classification act was sufficient to validate pre-existing Sec. 8655 as a general law defining the power of counties (with respect to the office of county highway engineer), under Sec. 8, Art. VI of the Constitution, because applicable alike to every county in the state, the proviso would have to fall because it is neither applicable to all of the counties of the state, nor to any particular class or classes of counties as defined by the classification act, and, hence, is in no sense a general law within the meaning of the constitutional provision we are considering. The circumstance that the two counties to which the proviso ever applied (St. Louis County and Jackson, each having a population of more than 50,000, taxable wealth exceeding forty-five million dollars, and adjoining or containing a city of more than 100,000 inhabitants) now comprise the whole of 'Class 1' counties, as presently constituted, would not save it.

From the above, it would appear that the Kiburz case holds that the law setting up a classification of counties on the basis of (a) population; (b) taxable wealth; (c) proximity of a city of a certain population, must fail as being in conflict with Section 8, of Article VI, of the New Constitution of Missouri, on the ground that it does not set up a county classification by a general law.

We next direct your attention to the case of Inter-City Fire Protection Dist. v. Gambrell, 231 S.W. (2d) 193, a case decided by the Missouri Supreme Court in 1950. This was an action for a declaratory judgment to have the proper officials of Jackson County extend taxes for plaintiff, when properly certified, to include the taxable tangible property in that part of plaintiff's district extending into the city of Independence. At l.c. 196, et seq., the Court stated:

> "* * * It is further contended that 'House Bill 7 so far as it attempts to limit its application to "counties of Class One now or hereafter having a population of 450,000 inhabitants or more" is unconstitutional and void as an attempt to create an additional class of counties in violation of Article VI, Section 8, Missouri Constitution, 1945, limiting the power of the General Assembly to the creation of four classes of counties.' Appellant further says that the act is not applicable to all class one counties as St. Louis County, a class one county, is excluded. In support of these assignments appellant relies particularly upon State ex inf. Mytton v. Borden et al., 164 Mo. 221, 64 S.W. 172, 175 and State on inf. Taylor v. Kiburz, 357 Mo. 309, 208 S.W. 2d 285, 287.
>
> "In the Borden case the statute under consideration in effect created an additional class of cities to which it was applicable, contrary to constitutional provisions which limited the power of the Legislature to the creation of four classes. 164 Mo. 236, 64 S.W. 175.

"In the Kiburz case, 208 S.W. 2d 285, 287, the court said: 'Sec. 8, Art. VI of the 1945 Constitution introduced into the organic law a new requirement with respect to legislation governing the structure of county government, and so necessitated a general overhauling of the whole body of statute law concerning that subject, for absent classification of counties (and none existed theretofore within the meaning of this constitutional provision), there could be no valid legislation governing their organization and powers, subsequent to July 1, 1946. In obedience to this constitutional mandate, the 63rd General Assembly enacted Committee Substitute for House Bill 476, effective December 5, 1945, because of an emergency clause, which classified all of the counties of the state into four classes, basing the same on assessed valuation, and declaring such classification to be "the foundation upon which the whole structure of county government and laws relating thereto rests." Laws 1945, p. 1801, Mo. R.S.A. Sec. 13699.1 et seq.' (Italics ours.) The Kiburz case was an original proceeding in this court to determine title to the office of highway engineer of St. Louis County. A county matter was directly involved.

* * * * *

"Appellant insists that House Bill 7 involves 'county government'; that the board of a fire protection district is organized under the direction of the circuit court of the county; that the 'county government' levies and collects the taxes certified by the district; that the directors and the treasurer of the plaintiff district are required to file bonds with the circuit clerk; and that the treasurer of the district is further required each year to file with the county clerk a detailed financial statement. These matters are not decisive. Somewhat the same situation exists with reference to school, levee and drainage districts, which are not considered a part

> of the structure of county government. See State ex rel. Reorganized School District No. 4 of Jackson County, Mo., v. Holmes, Mo. Sup., 231 S.W. 2d 185, not yet reported in the State Reports.
>
> "(1) We think it apparent on the face of House Bill 7, supra, that it does not deal with 'the organization and powers' of counties. State ex rel. Webster Groves Sanitary Sewer Dist. v. Smith, 337 Mo. 855, 87 S.W. 2d 147, 152. Nor does it deal with 'a law applicable to any county.' It deals with a different type of political subdivision towit, a type of municipal corporation duly organized and existing under a general law providing for its incorporation by decree of the circuit court. Laws 1943, p. 852; Laws 1947, Vol. 1, p. 432, Mo. R.S.A. Sec. 13927.58 et seq. And see Art. X, Sec. 15, Constitution of Missouri, 1945. * * *"

As we understand the above case, its holding is that the organization of a fire protection district in first class counties, upon a population basis, does not contravene Section 8, Article VI, of the New Constitution of Missouri, because it does not deal with "the organization and powers" of counties, whereas in the Kiburz case, "a county matter was directly involved."

We next direct attention to the February 1952 opinion of the Missouri Supreme Court, in the case of Collector of Revenue of Jackson County v. Parcels of Land, 247 S.W. (2d) 83. In this case the Court had under consideration the position in a first class county of "a land trust." This body known as "a land trust" is created by authority of Section 141.700, RSMo 1949, and reads:

> "There is hereby created a commission for the management, sale and other disposition of tax delinquent lands, which commission shall be known as 'The Land Trust of . . . . . County, Missouri,' and the members thereof shall be known as land trustees. Such land trust shall

> have and exercise all the powers that are conferred by sections 141.210 to 141.810 necessary and incidental to the effective management, sale or other disposition of real estate acquired under and by virtue of the foreclosure of the lien for delinquent real estate taxes, as provided in said sections, and in the exercise of such powers, the land trust shall be deemed to be a public corporation acting in a governmental capacity."

The opinion in the above cited case was written by Ellison. At l.c. 92 appears a concurring opinion by Hyde, in which Ellison, Hollingsworth, Dalton, Leedy and Conkling, JJ., concur. That opinion is:

> "I concur in the opinion of Ellison, C.J. herein. However, I think something more should be said about the constitutionality of the Land Tax Collection Act, because the ground upon which it is upheld as to this particular case leaves doubt as to its validity after July 1, 1946. My view is that this Act is in no way affected by Sec. 8, art. VI of the 1945 Constitution or by Sec. 40 (21) of art. III thereof. I think we ruled on substantially the same situation in Inter-City Fire Protection District of Jackson County v. Gambrell, 360 Mo. 924, 231 S.W. 2d 193, 197, and that this case is governed by the principles therein stated and the authorities therein cited.
>
> "We held in that case that the questioned Fire District Act did not deal with 'the organization and powers' of counties. Instead we said: 'It deals with a different type of political sub-division, to-wit, a type of municipal corporation duly organized and existing under a general law providing for its incorporation by decree of the circuit court.' We held 'that the statute, House Bill 7, is not unconstitutional as "an attempt to create an additional class of counties in violation of

Art. VI, Sec. 8 of the Constitution of 1945", nor is it a statute "regulating the affairs of counties" within the meaning of paragraph 21 of Sec. 40, Art. III of the Constitution of 1945.' We have also held that a sewer district, even it wholly within a city, did not violate the similar provision of the Constitution of 1875, Sec. 7, art. 9, concerning the organization and classification of cities. State ex inf. Gentry v. Curtis, 319 Mo. 316, 4 S.W. 2d 467.

"(13,14) I think the same thing is true of the Land Tax Collection Act. It does not deal with 'the organization and powers' of counties and the Land Trust created by the Act is no part of county government. The Land Trust is a separate entity from the county; it is a public or political corporation. Spitcaufsky v. Hatten, 353 Mo. 94, 182 S.W. 2d 86, loc. cit. 108, 160 A.L.R. 990. The functions of the Land Trust go beyond county government. Its services are rendered not merely to the county but also to the State of Missouri and to every municipality, school district, road district, sewer district, levee district, drainage district and other tax districts located in the county in which it operates. It has its own official seal; 'the power to sue and issue deeds in its name'; 'the general power to administer its business as any other corporate body'; and it may convey real estate 'without in any case procuring any consent, conveyance or other instrument from the beneficiaries for which it acts.' 1943 Act, Sec. 40, Laws 1943, p. 1056, now Sec. 141.750, R.S. 1949 V.A.M.S. Thus it is completely independent of the county which may, through its county court, appoint only one of the three managing trustees. As a public corporation, it is really an agency of the State of Missouri in its governmental powers of collection of taxes, created

> for the purpose of orderly administration of tax delinquent lands to get reasonable returns for revenue, from taxation on all tax delinquent lands, to the State, its political subdivisions, the municipalities and special tax districts created by the State in the county in which it operates. I do not think this is changed by the elective features applicable to Class One Counties added by the Amendments of 1945 and 1949 (Laws 1945, p. 1926; Laws 1949, p. 602) because the organization, purposes and functions of the Land Trust remain the same. Therefore, it is my conclusion that the Land Tax Collection Act is not in conflict with either of the constitutional provisions relied upon herein and is a valid Act under the 1945 Constitution."

At this point our situation with respect to the problem which you have submitted to us would appear to be that if the sewage district law, heretofore discussed, does directly involve a county matter, that, on the authority of the Kiburz case, it must fall as being in conflict with Section 8, Article VI, of the New Constitution of Missouri, and of Section 48.020, RSMo 1949; but that if it does not deal with the organization and powers of counties, it is, on the authority of the Fire Protection District case, and the Collector of Revenue case, supra, valid. In other words, is the situation which you present more nearly analagous to the Kiburz case or to the Fire Protection District and Collector of Revenue cases?

It is our belief that the effect of Sections 249.430-249.660, inclusive, supra, is to create a situation very similar to that set forth in the Fire Protection District and Collector of Revenue cases; that it does not contravene Section 8, of Article VI, of the New Constitution of Missouri, nor of Section 48.020, RSMo 1949, supra. We therefore believe that Sections 249.430-249.660, supra, are in full force and effect.

CONCLUSION

It is the opinion of this department that sewer districts formed in St. Louis County should be formed according to the provisions of Sections 249.430-249.660, inclusive, RSMo 1949.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR, Attorney General

FEES:
CITY POLICE:

A policeman of the city of the first class is not entitled to the fee provided by Section 57.290, RSMo 1949, for making an arrest under a warrant issued by a magistrate.

February 15, 1952

FILED
24

2-18-52

Honorable John E. Downs
Prosecuting Attorney of
Buchanan County
St. Joseph, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this department, which request reads as follows:

> "Since the Police Officers in a city of the first class have the power to arrest under Sections 85.060 and 85.230, RSMo 1949, for violation of all state laws with or without process, the question arises as to the cost involved when a warrant issued by a Magistrate is directed to the Chief of Police of the City of St. Joseph.
>
> "As you know, St. Joseph is a city of the first class and as such maintains a municipal police department who derive their authority in part from Section 85.060, RSMo 1949. When a state warrant is directed by a Magistrate to the Chief of Police of St. Joseph, Missouri and, the person named in the warrant is apprehended by the Chief of Police who executes the warrant and the defendant is ultimately found guilty, a question arises in my mind as to the cost involved relative to the service and return on such

warrant. Does the one dollar fee provided for in Section 57.290, RSMo 1949 apply under the set of facts herein above set out for the service and return on such warrant and if so, does the one dollar fee accrue to the office of the Sheriff even though the warrant is served and executed by the Chief of Police?"

The question you have presented requires an interpretation of Section 57.290, RSMo 1949, said section provides in part as follows:

"Sheriffs, county marshals or other officers shall be allowed fees for their services in criminal cases and for all proceedings for contempt or attachment as follows:

For serving and returning each capias, for each defendant	$1.00
For serving a writ of attachment, for each person actually brought into court	1.00
For serving every writ of execution .	1.00
For entering return of non est on a capias or attachment	.50
For a return of nulla bona	.50
For summoning a jury to ascertain the sanity or pregnancy of a convict, drawing inquisition, and returning same	2.00
For summoning a grand jury	4.20
For summoning a petit jury and calling same at the trial	1.00
For executing a special venire when one shall have been actually ordered and issued	2.00
For summoning each witness	.50

For every return of non est on a subpoena	.25
For serving any rule of court or notice	.50
For calling each witness	.05
For taking recognizance	.50
For committing any person to jail . .	1.00
For every trial in a criminal case or confession	1.00
For every trial in a capital case . .	3.00

"In cities and counties having a population of three hundred thousand inhabitants and over, each deputy sheriff, not more than two, shall be allowed for each day during the term of court three dollars, to be paid by the city or county of three hundred thousand inhabitants or over. For the services of taking convicts to the penitentiary, the sheriff, county marshal or other officer shall receive the sum of three dollars per day for the time actually and necessarily employed in traveling to and from the penitentiary, and each guard shall receive the sum of two dollars per day for the same, and the sheriff, county marshal or other officer and guard shall receive five cents per mile for the distance necessarily traveled in going to and returning from the penitentiary, the time and distance to be estimated by the most usually traveled route from the place of departure to the penitentiary; the sum of five cents per mile for each mile traveled, while being taken to the penitentiary, shall be allowed to the sheriff to cover all expenses of each convict while being taken to the penitentiary, and all persons, convicted and sentenced to imprisonment in the penitentiary at any term or setting of the court, shall be taken to the penitentiary at the same time, unless prevented by sickness or unavoidable accident.* * *"

Before taking into consideration Section 57.290 RSMo 1949, relative to your inquiry, we note that Section 85.090 provides

that the chief of police shall be compensated for his services by a salary fixed by the board of police commissioners at not less than $2670 and not more than $3870 per annum.

The section provides that the "sheriff, county marshal or other officer" shall be entitled to the enumerated fees for their services in criminal cases. It is quite obvious that the chief of police acting in such capacity does not fall within the terms sheriff or county marshal, leaving for determination whether or not the chief of police, executing a warrant, issued by a magistrate falls within the phrase "or other officer" for the purpose of compensation under this section. It is a primary rule of statutory construction that in arriving at the intention of the legislature, all parts of a statute should be read and construed together.

Therefore, the term "or other officer" must be read and construed with the terms sheriff and county marshal as used throughout this section. The sheriff is a county officer exercising jurisdiction within the county for which he was elected. His duties involve attending the respective courts and executing such legal processes as may be directed to his office.

Turning now to the term county marshal, we note that there is no officer specifically designated as such. However, we presume that such term was intended to embrace such persons as a county jailer (State v. Wofford, 116 Mo. 220), who is charged with the care and custody of prisoners within the county. The stated prerequisite of being a <u>county</u> marshal , coinciding with the fact that a sheriff has county-wide jurisdiction would seem to indicate the class of officers sought to be compensated by this provision.

It is likewise fundamental that where general words in a statute follow specific words designating special things or persons the general words are, as a rule, limited to cases of the same general nature as those which are specified. This rule is stated in the case of State ex rel. Goodloe v. Wurdman, 286 Mo. 160, as follows:

> "* * *It is a familiar rule of statutory construction that where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase should be construed to refer to things of the same kind. (19 C.J. p. 1255.) * * *."

Honorable John E. Downs

We note that throughout Section 57.290, RSMo 1949, reference is made to deputies and guards, and are of the opinion that the term "other officers" was intended to include such officers as are specifically enumerated in addition to the sheriff and county marshal.

Under the foregoing rules of construction, we are of the opinion that the chief of police, executing a warrant issued by a magistrate, is not entitled to compensation as provided in Section 57.290, but that such provision was intended to compensate those officers whose regular duties involve the attendance upon the courts having jurisdiction in criminal matters and who were prior to 1945, not compensated on a salary basis but solely upon fees.

We are likewise of the opinion that the one dollar fee provided by Section 57.290, RSMo 1949, for executing a warrant of arrest would not accrue to the sheriff's office under the facts that you have presented, since no service has been performed by that office.

CONCLUSION

Therefore, it is the opinion of this department that the chief of police of the City of St. Joseph, who executes a warrant or arrest issued by a magistrate and directed to such officer is not entitled to the fee provided for such service by Section 57.290, RSMo 1949, since such officer does not fall within said provision.

Respectfully submitted,

D. D. Guffey
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DDG:hr

FEES:
MAGISTRATE COURT:
PROSECUTING ATTORNEY:
MAGISTRATE CLERK AND
SHERIFF:

Prosecuting attorney's fee in this case is $5.00; the fee of the magistrate's clerk is $2.50 and sheriff receives nothing.

February 18, 1952

FILED
24

2-19-52

Honorable John E. Downs
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Mr. Downs:

We have before us your letter containing a request for an opinion which has been assigned to me for answer. The pertinent part of your letter is as follows:

> "Assuming that no warrant has been issued--pursuant to Section 545.310--by reason of the fact that the defendant was either in custody, or voluntarily surrendered himself to the custody of the court, and that the Sheriff was not present at the time of hearing, and that the defendant was found guilty of a misdemeanor in the Magistrate's Court, what costs should be allowed?"

Section 56.310 RSMo 1949, reads in part as follows:

> "Prosecuting attorneys shall be allowed fees as follows, * * *for the conviction of every defendant in the circuit court, upon indictment or information, or before a magistrate court, upon information, when the punishment assessed by the court or jury or magistrate shall be fine or imprisonment in the county jail, or by both such fine and imprisonment, five dollars; * * *"

We are of the opinion that the aforesaid quoted part of this section of the statute is pertinent with regard to the taxing of the fee of $5.00 to the prosecuting attorney and should be made a part of the costs in the action inquired about in your letter.

Section 483.610, RSMo 1949, of which the part pertaining to

Hon. John E. Downs

your question reads as follows:

> "(2) In each criminal proceeding and in each preliminary hearing instituted in any magistrate court, a magistrate court fee of two dollars and fifty cents shall be allowed and collected to be in full for the services of the magistrate or the clerk of said court. Such fees shall be charged, collected and disposition thereof shall be made as provided by law applicable thereto."

It is our opinion that the above quoted section of this statute allows the charge of $2.50 as the costs in the case set out in your opinion request to be charged. Of course you refer to it as $2.50 to the state but actually it is the magistrate or clerk's fee in the magistrate court. Under the circumstances set forth in your letter we are of the opinion that the sheriff is entitled to no fee whatsoever.

CONCLUSION

It is therefore the opinion of this department that the prosecuting attorney's fee in this case is $5.00; the fee of the magistrate's clerk is $2.50 and that the sheriff receives nothing where no warrant was issued and the sheriff was not in attendance and defendant was found guilty of a misdemeanor.

Respectfully submitted,

A. BERTRAM ELAM
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ABE:mw

SOCIAL SECURITY:
SOCIAL WELFARE BOARDS: Employees of social welfare boards are not employees of the city or county. A social welfare board is an instrumentality and its employees may be covered under the Old Age and Survivors Insurance provisions of Title 2 of the Federal Social Security Act only by an agreement entered into between the state agency and the social welfare board of the county.

FILED
24

April 4, 1952

4-11-52

Honorable John E. Downs
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

This is with further reference to your letter requesting an opinion, which reads as follows:

> "We have been requested to ask your office for an opinion with reference to the Social Welfare Board of the County of Buchanan, which was created and established pursuant to Sections 205.770 through 205.840 of the Revised Statutes of Missouri, 1949.
>
> "The question arises as to whether or not the employees of the Social Welfare Board are employees of the County, or whether the Social Welfare Board is a juristic entity similar to the Farm Bureau.
>
> "The Social Welfare Board consists of eight members. As I understand it, the City of St. Joseph contributes $35,000.00 or $40,000.00, and the County contributes $28,000.00 for the program. The eight members are appointed by both the County and City. The Board has exclusive control over the distribution and expenditures of donations and public funds appropriated to it. It also has the power to sue or be sued, and has exclusive control over the employees of the Board. It pays its' employees out of funds appropriated to the Board.

Honorable John E. Downs

> "Would you please send this office an opinion as to whether or not the employees of the Social Welfare Board are County employees under the provisions of Senate Bill No. 3, or whether or not the Social Welfare Board is an instrumentality as defined in Senate Bill No. 3, entitling the employees to come under the act by an agreement entered into directly with the State."

It is noted that you have outlined the power of the Social Welfare Board of the County of Buchanan in your letter. We have noted in Sections 205.770 and 205.840, RSMo 1949, that the board referred to has among its powers the power to receive and expend donations for social welfare purposes; has exclusive control over the distribution and expenditure of any public funds, appropriated; has power to promote the general welfare of the board; to sue and be sued, complain and defend; assume the care of and take by gift, grant, devise, bequest or otherwise, any money, real estate, personal property, or other valuable things, and may use, enjoy, control, sell or convey the same for charitable purposes; and to have and use a common seal and alter the same at pleasure. It is further allowed to make by-laws for its own guidance, rules and regulations for the government of its agents, servants and employees, and for the distribution of funds under its control.

The board is given additional powers to those above mentioned in Section 205.780, RSMo 1949. Section 205.790, RSMo 1949, provides for the members of the board, their appointment, tenure and compensation, together with the method of filling vacancies. This same section provides that the board shall be nonpartisan and nonsectarian. It makes the mayor of the city and the presiding judge of the county, ex-officio members of the board and provides for three members from the city and three members from the county. Their tenure of office is staggered so that a county member and a city member has his term expiring each year. Section 205.800, RSMo 1949, provides for the organization of the board and that its members elect a president, vice-president, treasurer and secretary. Section 205.810, RSMo 1949, provides that all monies received or appropriated for the use of the board shall be deposited with the treasurer. It is obvious from the law providing for the board and its activities that their employees are the employees

of the board paid out of the treasury of the board. They are neither county nor city employees, the city and county, under the dictates of the statute, having lost control over them. Neither the city nor the county pay them.

However, since they are distinctly governmental employees in a distinctly governmental function, they are definitely covered by the provisions of Senate Bill No. 3. In the opinion of Mr. Donal D. Guffey of this office, a copy of which is enclosed, written October 25, 1951, in regard to the county farm bureaus, an instrumentality under the provisions of Senate Bill No. 3 was defined. As it was defined in that opinion in regard to a county farm bureau, it is equally true in regard to the social welfare board of Buchanan County. That, although it is not completely separate and distinct from the city, county or state, from two of which it is likely to receive the major portion of its compensation, it is still legally separate and distinct from the above governmental organizations.

In Senate Bill No. 3 of the 66th General Assembly, Section 1, Subsection (6), defines the term "Instrumentality" as follows:

> "'Instrumentality', an instrumentality of a state or of one or more of its political subdivisions but only if such instrumentality is a juristic entity which is legally separate and distinct from the state or such political subdivision and whose employees are not by virtue of their relation to such juristic entity employees of the state or such subdivision;"

We believe that the social welfare board of the County of Buchanan comes within the terms of the above definition.

CONCLUSION

It is therefore the opinion of this department that the employees of the social welfare board of the County of Buchanan are not employees of the City of St. Joseph or of the County of Buchanan. We are further of the opinion that the social welfare

Honorable John E. Downs

board of the County of Buchanan is an instrumentality as defined by the act and that its employees may be covered under the Old Age and Survivors Insurance provisions of Title 2 of the Federal Social Security Act only by an agreement entered into between the state agency and the social welfare board of the County of Buchanan.

Respectfully submitted,

JAMES W. FARIS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JWFab

Enclosure.

SCHOOLS: Compulsory retirement provision for members of PSRS now effective as WWII has been officially terminated. Board of trustees of PSRS has no duty to restrain member from teaching after attaining compulsory retirement age. Member who has attained compulsory retirement age not eligible for retirement allowance if he continues to teach. Board of trustees should not accept contributions in behalf of member and employer if member continues to teach after automatically retired.

May 29, 1952 6-16-52

FILED
24

Mr. G. L. Donahoe
Executive Secretary
Public School Retirement System
State Capitol Building
Jefferson City, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this department, which reads as follows:

"Section 169.060 (1) RSMo 1949 provides as follows:

"'A member who is seventy years of age or more one year after the date the retirement system becomes operative shall be retired as of that date and shall be entitled to benefits, as provided in sections 169.010 to 169.130, on the basis of his creditable service. Thereafter, a member shall be retired automatically on the first day of July next following the school year in which he reaches the age of seventy years, and shall thereupon be entitled to benefits, as provided in sections 169.010 to 169.130, on the basis of his creditable service; provided, however, the compulsory retirement age shall not be effective for the duration of World War II.'

"Under date of January 30, 1952, you wrote an opinion in response to a question from our office which read, 'Will retirement at age seventy as provided for in Section 169.060, RSMo 1949, be compulsory as of July 1, 1952?' The conclusion to your opinion read as follows:

"'Therefore, it is the opinion of this department that the compulsory retirement provision for members of the Public School Retirement System at age seventy, as provided in Section 169.060, RSMo 1949, will not be effective July 1, 1952, in the absence of an official termination of the war with Japan by appropriate political or governmental action.'

"Since your opinion was received on February 5, 1952, it is our understanding that the United States Senate has recommended the ratification of the peace treaty with Japan, and the President has ratified said treaty.

"We wish to request an official opinion which will answer the following:

(1) Has there been appropriate political action taken to terminate the war with Japan and thereby terminate World War II and make the provision for compulsory retirement effective as of July 1, 1952?

(2) If a member teaches in a district included in the Retirement System after reaching the compulsory retirement age, does the Board of Trustees have the duty or responsibility to take action to restrain the member from serving as a teacher?

(3) If a member who has reached the age of seventy teaches on a full-time or part-time basis in a district included in the Retirement System, will he be eligible to receive a retirement allowance during the period in which he teaches?

(4) If a member seventy or more years of age teaches in a district included in the Retirement System, should the Board of Trustees of the Retirement System accept contributions withheld from the salary of the teacher along with matching contributions of the employer and allow the teacher membership service credit because of the services rendered?"

You are correct in your statement that since receipt of our previous opinion, written January 30, 1952, the United States Senate has recommended ratification of the peace treaty with Japan and the same has been ratified by the President.

Such being done, we conclude that, in view of the authority cited in our earlier opinion submitted to you, appropriate governmental and political action has been taken to officially terminate the war with Japan and thereby officially terminate World War II insofar as the United States is concerned.

Section 169.060(1), RSMo 1949, provides:

> "1. A member who is seventy years of age or more one year after the date the retirement system becomes operative shall be retired as of that date and shall be entitled to benefits, as provided in sections 169.010 to 169.130, on the basis of his creditable service. Thereafter, a member shall be retired automatically on the first day of July next following the school year in which he reaches the age of seventy years, and shall thereupon be entitled to benefits, as provided in sections 169.010 to 169.130, on the basis of his creditable service; provided, however, the compulsory retirement age shall not be effective for the duration of World War II." (Emphasis ours.)

By enactment of the above statute the Legislature undertook to establish a compulsory retirement age of seventy years for members of the Public School Retirement System. However, the operation of the compulsory retirement age provision in its application to retirement of members was withheld for the duration of World War II.

Inasmuch as we have concluded that World War II is now officially terminated, it would therefore follow that the compulsory retirement age as provided in the statute is now effective. Consequently, your first question is answered in the affirmative.

In answering your next three questions a number of statutes will be cited and referred to, and unless otherwise indicated they will be contained in the 1949 Revised Statutes.

By the enactment of Sections 169.010 to 169.130, inclusive, the Legislature has created a public school retirement system which includes all school districts within the state with a population of less than 75,000. The membership in said system is largely comprised of public school teachers, and the administration and management of the system is vested in a board of trustees consisting of five persons. It is so provided in Section 169.020.

The Public School Retirement System was created for the purpose of providing retirement allowances and other benefits for public school teachers. Thus Section 169.020(1), in part, reads:

> "For the purpose of providing retirement allowances and other benefits for public school teachers, there is hereby created and established a retirement system, which shall be a body corporate, shall be under the management of a board of trustees herein described, and shall be known as 'The Public School Retirement System of Missouri.' * * *"

The funds for the operation of the retirement system are derived from contributions made in equal amounts by the members and their employers. It is so provided in Section 169.030(1), which reads:

> "The funds required for the operation of the retirement system created by sections 169.010 to 169.130 shall come from contributions made in equal amounts by members of the system and their employers, and from such interest as may be derived from the investment of any part of such contributions. All contributions shall be transmitted to the board of trustees by employers in such manner and at such times as the board by rule shall require."

The remaining portion of the above statute provides for the amount and manner in which the contributions are to be collected from the members and transmitted to the board of trustees.

Section 169.050 declares who are members of the retirement system and provides for membership credits for services rendered. Paragraph 5 of this section provides how membership in the system shall be terminated, and reads as follows:

> "5. Membership shall be terminated by failure of a member to be a public school employee under this system for more than four of any five consecutive years, by death, withdrawal of contributions, or retirement based on either age or disability." (Emphasis ours.)

Section 169.070 provides for the amount of retirement allowance to be paid members upon retirement, based in part upon final average salary and creditable service.

As heretofore pointed out, Section 169.060(1) provides for compulsory retirement at age seventy. Paragraphs 2, 3 and 4 of this section provide for voluntary retirement by members at an age less than seventy years and for disability retirement.

It will thus be seen that the Legislature has provided for a complete scheme or method of retiring public school teachers from public school teaching service and for the payment of those so retired a retirement allowance.

Inasmuch as your questions relate to the retirement of members who have reached age seventy, it becomes necessary to further construe Section 169.060(1), supra.

The statute says that a member "shall be retired automatically on the first day of July next following the school year in which he reaches the age of seventy years, and shall thereupon be entitled to benefits, as provided in sections 169.010 to 169.130, on the basis of his creditable service."

The word "retire" has been defined as meaning to separate or withdraw from active service. State ex rel. Haberlan v. Love, 95 Nebr. 573, 145 N.W. 1010, 1013. Applying this definition to the language in the statute it would mean that a member shall be automatically withdrawn or separated from active service on the first day of July next following the school year in which he reaches the age of seventy years.

The word "automatically" implies something to be done without option or choice. Thus in the case of Poe v. Penn Mut. Life Ins. Co., 32 F. Supp. 167, the court was construing a life insurance

contract requiring the insurer, after the policy had lapsed for nonpayment of premium, to "purchase automatically" for the insured paid-up insurance, using the proceeds of the value of the policy. In declaring the meaning of the phrase "to purchase automatically" the court, at l.c. 168, said:

> " * * * The phrase 'to purchase automatically' constitutes an unambiguous requirement that the defendant act 'automatically', that is, without option or choice on its part, in purchasing such insurance with the proceeds of the value of the policy. * * *"

Again paraphrasing the language of the statute, using the above definition of the word "automatically," it would mean that a member of the retirement system upon reaching the age of seventy years in a particular school year shall be withdrawn or separated from active service, without option or choice, on July 1 next following.

The statute further declares age seventy as being the "compulsory" retirement age. In defining the word "compulsory" the Supreme Court of Arizona, in State v. Bradley, 230 P. (2d) 216, 220, said:

> " * * * According to standard dictionaries the word compulsory means 'involuntary or forced' in contradistinction to voluntary. * * *"

Under the above definition a member attaining the age of seventy years does not have a choice to voluntarily retire, but his retirement is by law made involuntary and he is forced to withdraw or separate from active service.

In the case of Haag v. City of New York, 222 N.Y.S. 676, the court was considering a New York law creating a retirement system and providing for the retirement of officers and employees of the city of New York. A particular section of the law provided that each member in the city service shall be retired on the first day of the calendar month next succeeding that in which said member shall have attained the age of seventy years. In interpreting the law the court, at l.c. 680, said:

> " * * * To my mind it indicates the understanding of the Legislature that the words

> 'shall be retired' mean discontinuance in and incapacity to hold appointive office. There is no other condition from which the officials named could conceivably be excepted. * * *
>
> "Second, the contemporaneous literature which accompanied the passage of these laws points out their dual function, namely: (a) To provide for the support of faithful public officials after they attain the traditional age of 'threescore and ten' (or their intermediate accidental incapacity); and (b) by rendering removal automatic, to relieve the appointing power from the dilemma either of removing the ordinarily superannuated employee, thus leaving him without means of support, or of allowing him to continue in the service out of humanitarian motives to the manifest detriment of the service."

It is logical to presume that our state Legislature, in creating the Public School Retirement System and in providing for the retirement of members thereof, had the same purpose in mind as the court in the above case pointed out with reference to the retirement law which it was considering.

It will thus be seen that by the enactment of Section 169.060(1) the Legislature intended that retirement or withdrawal from active service of a member of the retirement system was to be mandatory upon said member attaining the age of seventy years, and that upon reaching such age a member is by law rendered incapacitated to continue in active teaching service.

Turning now to your second question, it is our thought, in view of what has been heretofore said relative to the mandatory retirement of members of the retirement system reaching age seventy, that the Legislature has clearly intended to prohibit such a condition as you have presented. No exceptions are provided in the law whereby a teacher or member may continue to teach after attaining the compulsory retirement age. Under the provisions of the law as we have construed it such a member is automatically retired from active service and no teaching employment in the public schools should thereafter be undertaken.

The powers and duties of the board of trustees are given and imposed under Section 169.020, and more specifically in numbered paragraphs 2, 14, 15, 16 and 17. Nowhere does it appear that the board has the duty to take action to restrain a member from serving as a teacher after he has reached the compulsory retirement age should such member and a school district which might employ him ignore the requirements of the law and enter into a contract of employment.

Insofar as employment of a teacher is concerned, be it before or after the teacher has attained the compulsory age, it is a matter of contractual relationship existing between the teacher and the school district to which the board of trustees is in no way a party.

We might point out that in one instance the board is by statute authorized to take appropriate action by instituting legal proceeding. Under Section 169.030 if an employer fails to transmit contributions to the board as required by law, the board shall institute suit to recover the amounts for which the employer is rendered liable.

Apparently the Legislature never contemplated that a member would continue teaching after reaching the compulsory retirement age or that a school district would undertake to employ such a member, and it apparently did not consider it necessary to invest the board with authority to restrain such teaching by instituting appropriate action as it gave the board authority to institute suit to recover contributions.

In view of the foregoing, your second question is answered in the negative.

As a practical matter it would seem proper, and would be sound procedure to follow, for the board of trustees to give notice of retirement to a member reaching the compulsory retirement age and also to give notice of said retirement to the employer of the member. In giving such notice it would also be proper to request of the member that application be made for retirement allowance.

Now to consider your third question. In connection therewith we are assuming that your reference to full-time employment means that as defined in the rules and regulations promulgated by the Board of Trustees of the Public School Retirement System, and that your reference to part-time employment means regular employment but in a lesser degree than full-time employment.

Section 169.010(10) defines "retirement allowance" as follows:

> "(10) 'Retirement allowance' shall mean a monthly payment for life, during retirement."

Certainly under the above statute, as well as other provisions of the law, it is the manifest intent and policy of the Legislature that the monthly payment or retirement allowance is only payable to the member after and during actual retirement, which would mean after actual separation from teaching service. In short, if a teacher continues to teach he is not retired as intended by the Legislature, and therefore we do not believe he would be eligible to receive a retirement allowance.

In the case of McBride v. Retirement Board of Allegheny County, 199 A. 130, a mandamus action was instituted to require the payment of a retirement allowance during the time that the plaintiff was employed, after his retirement, by the state of Pennsylvania. Plaintiff had been an employee of the county and had been retired under an act establishing a retirement system for county employees. In considering the question, whether or not re-employment in the same capacity after retirement denies a person his retirement allowance during the period of such employment, the Supreme Court of Pennsylvania said, at l.c. 133:

> " * * * Where one has been employed by one of the units of government, has been placed upon the retired list, and is then re-employed by the same political unit, there is much room for argument that he should not be entitled to receive a retirement allowance and compensation on his return to service. These laws must be construed equitably in the interest of the state and the employee. It is evident the retirement act did not intend a different result, and that one re-employed in the same position from which he had retired cannot be considered 'retired.' Nor would he be retired if employed by the same unit of government. * * *"

Again in People ex rel. Malone v. Mueller, 66 N.E. (2d) 516, the Appellate Court of Illinois was considering whether or not a fireman who had been retired under a pension act could continue to receive his pension upon re-entering active service with the fire department. At l.c. 525 the court said:

> " * * * When a fireman has retired, received pension payments and thereafter re-enters the active service of the fire department, he is not a retired fireman within the meaning of the pension act. His pension payments

> are properly suspended while he is in such active service and receiving the salary of an active fireman. * * *"

In view of the foregoing authorities, we take the position that a member of the Public School Retirement System who continues to teach on a full or part-time basis after reaching the compulsory retirement age is not actually retired within the meaning of the law so as to be eligible to receive retirement allowance during the period in which he teaches. In other words, he would be continuing in the same employment from which he was automatically retired. Therefore, your third question is answered in the negative.

Now to proceed to your fourth question.

Under the law the board of trustees, for the purpose of determining membership in the retirement system, must consider a teacher who has reached the compulsory retirement age of seventy years as automatically retired on the basis of age.

As heretofore quoted, Section 169.050(5) provides that "Membership shall be terminated by * * * retirement based on either age or disability."

Relative to transmittal of contributions, Section 169.030(2), in part, reads:

> "2. For each school year following the date on which the system becomes operative, each and every employer of one or more persons who are members of the system shall transmit to the board of trustees, before the end of such school year, twice the amount that is deductible from the pay of such employee or employees during the school year. * * *"
> (Emphasis ours.)

In reading the above section it is apparent that contributions are to be transmitted to the board only in behalf of members of the system, and it would therefore follow that only contributions for and in behalf of members should be accepted by the board.

Inasmuch as a member who has attained the compulsory retirement age is automatically retired on the basis of age, and therefore terminates his membership in the retirement system, we are of the opinion that any attempted transmittal of purported contributions in behalf of a former member who continues to teach

after reaching age seventy should not be accepted. For the same reason a teacher who has reached the compulsory retirement age would not be entitled to membership service credit because of the services rendered after automatic retirement. Consequently, your fourth question is answered in the negative.

CONCLUSION

It is therefore the opinion of this department, in answer to the questions which you have propounded, that:

1. There has been appropriate political and governmental action taken to terminate the war with Japan and thereby terminate World War II so as to make the provision in the law for compulsory retirement for members of the Public School Retirement System effective as of July 1, 1952.

2. The board of trustees of the Public School Retirement System has no duty or responsibility to take legal action to restrain a member from continuing in teaching service after said member has attained the compulsory retirement age.

3. A member who has reached the compulsory retirement age and who is automatically retired will not be eligible to receive retirement allowance during the period in which he may continue to teach, either on a full or part-time basis, after being retired.

4. If a teacher who has reached the compulsory retirement age thereafter continues to teach, the board of trustees of the Public School Retirement System should not accept contributions withheld from the salary of the teacher, together with matching contributions of the employer. Nor should said teacher be allowed membership service credit because of services rendered after automatic retirement.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:ml

CRIMINAL COSTS: Services and attention by a dentist to a prisoner confined in a county jail--later convicted of a felony--are not lawful charges of criminal costs as medical expenditures against the State under Section 221.120 RSMo 1949.

October 20, 1952 10/24/52

FILED
24

Honorable John E. Downs
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Mr. Downs:

This will be the opinion you requested from this office respecting the right of Buchanan County to be reimbursed in the sum of Nine ($9.00) Dollars for the payment of dental services and attention of a dentist for a prisoner confined in its county jail as an item of criminal costs as a medical expenditure to be paid by the State upon the conviction of said prisoner for a felony because the item in such amount, included in the cost bill required by law, was deducted by an official in the Department of Revenue. Your letter requesting the opinion reads as follows:

> "A situation has come up in our County, and I request an opinion of your department concerning it.
>
> "On October 4, 1951, one Don LeRoy Fanning (then in jail awaiting trial on a charge of First Degree Robbery) was treated by a private dentist at the request of the jailer, and a dental bill of Nine Dollars ($9.00)--Three Dollars of which was for treatment of a tooth, and Six Dollars of which was for its removal, was incurred. On November 6, 1951, the subject entered a plea of guilty as charged, and his punishment was assessed at fifteen years in the penitentiary. This Nine Dollars was included on the cost bill in the case of Don LeRoy Fanning, but a deduction was made by the Criminal Cost Clerk of the Department of Revenue.

Honorable John E. Downs:

> "It seems to me that Section 221.120, of the '49 Statutes, would cover this section, and the County is entitled to be reimbursed for this medical expenditure."

Your letter states that it appears to you that Section 221.120, RSMo 1949, applies, and that Buchanan County is entitled to be reimbursed for such item as and for a "medical expenditure". Said Section 221.120 states:

> "In case any prisoner confined in the jail be sick, and, in the judgment of the jailer, needs a physician or medicine, said jailer shall procure the necessary medicine or medical attention, the costs of which shall be taxed and paid as other costs in criminal cases; or the county court may, in their discretion, employ a physician by the year, to attend said prisoners, and make such reasonable charge for his service and medicine, when required, to be taxed and collected as aforesaid."

The question is whether the services and attention given to such prisoner, as detailed in your letter, were medical services under Section 221.120, and the payment therefor a medical expenditure.

Sub-section (2) of Section 195.010, RSMo 1949, defines "physician" as follows:

> "'Physician' means a person authorized by law to practice medicine in this state and any other person authorized by law to treat sick and injured human beings in this state and to use narcotic drugs in connection with such treatment;"

We do not find the phrase "medical attention" defined by any lexicographer, nor is it defined in our statutes defining and construing words or phrases.

"Words and Phrases" cites a California case defining the phrase in Travelers' Ins. Co. of Hartford, Conn. vs. Byers, 11 Pac. (2d) 444. The case was before the District Court of Appeal, Fourth District, California, on the question of whether

an insured in his application had truthfully or fraudulently answered in his application for insurance the question: Q. "Have you within the past 5 years received medical advice or attention?" A. "No." * * *. The Court on the facts in evidence held there was no fraud in the answer to the question, and, giving meaning to the phrase "medical advice or attention" contained in the question, the Court, l.c. 447, said:

> "The question as to the insured, Byers, having received medical advice or attention in the Stafford application, refers to medical advice or attention for some ailment which would affect the general soundness and healthfulness of his system, * * * ."

The word "medicine" is defined in Webster's New International Dictionary, Second Edition, page 1527, definition 1: "Any substance or preparation used in treating disease."

Reading the recital of facts in the request for this opinion, and reading the terms of Section 221.120, it appears that the prisoner was not "sick"; did not need a "physician" or "medicine"; that no medicine or medical attention was provided by the jailer or given the prisoner, nor did a physician attend him. In fact, none of the things required to exist and be administered to the prisoner by Section 221.120 in order to fix a financial obligation upon the State as costs did exist or were done for him.

The facts recited disclose that the prisoner needed dental treatment of a tooth and the extraction thereof. A dentist was called for the prisoner, treated the tooth, and subsequently extracted the same.

Section 221.120, RSMo 1949, makes no provision for providing treatment or services by a dentist to a prisoner confined in a county jail in need of dental attention. The statute thus, we believe, justifies the application of the rule of construction that express mention of one subject in a statute excludes all subjects not mentioned. 59 C.J. states the rule, page 984, as follows:

> "* * * where a statute enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned; * * * ."

Honorable John E. Downs:

We believe the statute must expressly include the extraction of a tooth and dental attention to a prisoner confined in a county jail in order that the cost thereof may be included lawfully in a cost bill rendering the State liable as and for criminal costs upon the conviction of any such prisoner. The statute does not so provide. The question of the distinction between the professions of medicine and dentistry was before our Supreme Court in the case of State ex rel. Flickinger vs. Fisher, 119 Mo. 344.

The case arose when the relator, a dentist, claimed that he was exempt from jury service under a statute--Section 6062, R.S. Mo. 1889--exempting from jury service a "'person exercising the functions of a * * * practitioner of medicine.'" The relator dentist claimed that because he had a diploma from a dental college and had a certificate from the city register, which certificate recited that relator's name had been entered on the roll of Dental Surgeons in the City Register's office, he was exercising the functions of a practitioner of medicine, and was exempt from jury duty. The Court held that he was not performing or exercising the functions of a practitioner of medicine, and, therefore, was not exempt from doing jury duty under the statute. In so holding the Court, l.c. 352, said:

> "Here, it can not be successfully claimed that relator finds any exemption in the terms of the statute, for certainly he is not a 'practitioner of medicine and surgery in any of their departments,' as defined in section 6871, nor does he exhibit the qualifications required by that section, to wit, a diploma from a legally chartered medical institution in good standing and a certificate from the board of health. * * *."

The Court, in its decision of the case, applied the rule of construction that the expression of one subject excludes other subjects not expressly mentioned in a statute. The case is not a lengthy one, but the discussion by the Court of the decisive principles and statutes relied upon in its decision are in separate paragraphs, and we quote above only the excerpt from the opinion, l.c. 352, which shows that a dentist is not a practitioner of medicine and surgery in any of its departments. We think the case is in point here because, if there was such a definite distinction as there held by the Court between the practice of dentistry and the practice of medicine, on the question of exemption from jury duty, the distinction becomes clearly applicable when related as here

to the question of paying out public money for the performance of dental services for a prisoner confined in jail under a statute fixing only medical services, medicines and the attention of a physician as the basis for including the costs thereof in a criminal cost bill.

If, therefore, the cost of treatment of a diseased tooth and the later extraction thereof by a dentist are not expressly authorized by the statute as are medicines and a physician's services for a prisoner confined in jail--and we hold they are not so authorized by any statute, including said Section 221.120--so that such charges may be included in a criminal cost bill as costs, and therefore are, as items of costs, unlawful, we believe the official who struck the item from the cost bill, was within the proper performance of his official duties in so doing. The official was no doubt familiar with the express terms of Section 221.120, RSMo 1949, providing for such costs to be taxed against the State only where the prisoner may be sick and needs the attention of a physician and medicines, or his attention may have been directed to Section 33.200, RSMo 1949, which, with a heavy penalty, prohibits the Comptroller from certifying claims for payment by the State Auditor not authorized by law. Said section reads as follows:

> "If the comptroller shall knowingly certify any claims or accounts for payment by the auditor, not authorized by law, he shall, upon conviction thereof, be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in the penitentiary for not less than two years nor more than five years."

Another case somewhat in point is City of Cherokee vs. Perkins, 118 Ia. 405, 92 N.W. 68. In that case there was an Iowa statute which gave the power to cities and towns to license and tax itinerant doctors, physicians and surgeons. The City of Cherokee enacted an ordinance making it unlawful for any itinerant physician, surgeon or doctor of dental surgery to practice within the city without first obtaining a license. A dentist had undertaken to practice dentistry in said city without obtaining such a license and prosecution was instituted against him under the city ordinance. The question which the Supreme Court of Iowa was considering in deciding the case was whether or not the State law authorized cities and towns, and particularly the City of Cherokee, to license and impose a tax

on itinerant dental surgeons. In ruling on the question the Court, at N.W. l.c. 69, said:

> "* * * By section 700 of the Code the power is given cities and towns to regulate, license, and tax 'itinerant doctors, itinerant physicians and surgeons,' etc. The only question for our determination is whether a practitioner of dental surgery comes within the definition of itinerant doctor or itinerant physicians and surgeons. It has been held that the terms 'dentist' and 'surgeon' are not interchangeable. People v. DeFrance (Mich.) 62 N.W. 709, 28 L.R.A. 139; State v. Fisher (Mo.) 24 S.W. 167, 22 L.R.A. 799. Certain it is that the professions are largely separate and distinct from each other. The practice of each is regulated by different chapters of the Code, and the legal rights, duties, and responsibilities of each are dissimilar in very many respects. If, therefore, the power to license and tax, given to municipalities by statute, is to be confined to 'physicians and surgeons,' then we note that the language cannot be extended to include 'dental surgeons.' * * * The majority of the court, * * * hold to the opinion that the provisions of the statute cannot be extended so as to include dental surgeons; that, if the legislature had intended to make them subject to the statutory provisions, it would have so said in terms; that the expression 'itinerant doctor,' as found in the statute, is to be classed with the succeeding expression, 'itinerant physician and surgeon'; and that both relate to those persons who in some form, or following some school practice either medicine or surgery, or both."

Considering the facts in the case and the statutes and authorities cited and quoted herein, we believe the official in the Department of Revenue was right in striking the Nine ($9.00) Dollars item discussed, from the cost bill, because the same was not authorized by law.

Honorable John E. Downs:

CONCLUSION.

It is, therefore, the opinion of this Department that under the facts herein, and under the authorities cited, quoted and discussed, Buchanan County is not entitled to be reimbursed for the dental services provided for the named prisoner confined in the jail of that county as an item of criminal costs under said Section 221.120 or any other statute of this State as a medical expenditure.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GWC:ir

CHIROPRACTIC:
EXAMINATION:
LICENSE:

Applicant for examination for chiropractic license to practice chiropractic must be a graduate of an accredited chiropractic school or college.

3-4-52

FILED
25

March 1, 1952

Dr. S. J. Durham
Secretary, State Board of
Chiropractic Examiners
204½ East High Street
Jefferson City, Missouri

Dear Dr. Durham:

Your request for an official opinion has been assigned to me for reply. Your request is as follows:

> "Does Section 331.030, RSMo 1949, require that a student must be a graduate of a chiropractic college before being eligible to take the examination for a license to practice chiropractic."

Section 331.030, RSMo 1949, paragraphs one and two are as follows:

> "1. No person shall engage in the practice of chiropractic without having first secured from the board of chiropractic examiners a license as provided in this chapter. Any person desiring to procure a license authorizing him to practice chiropractic in this state shall make application therefor to the secretary of the Missouri state board of chiropractic examiners on a form prescribed therefor, giving name, sex, age, which shall not be less than twenty-one years, name of school or college of which he is a graduate, and shall furnish the board satisfactory evidence of preliminary education as required in this chapter, and of good moral character, and that he is a graduate of a chiropractic school or college teaching chiropractic in accordance with the requirements of this chapter, which shall be determined by the board, together with such other information as the board may require, and which application shall be sworn to or affirmed before some other officer authorized to administer oaths and affirmations.

> "2. Any applicant who applies for examination to procure a license to practice chiropractic, and who has matriculated in a chiropractic school or college after the passage and approval of this chapter, shall furnish satisfactory evidence of their preliminary educational qualifications, to wit: A certificate of graduation from an accredited high school or its equivalent. Their chiropractic course shall cover a period of not less than three years of nine months each, and requiring actual attendance of not less than two thousand and forty-five hours which shall be construed as the maximum requirements for qualifications to practice chiropractic under this chapter." (Underscoring ours.)

We see in paragraph one above that an applicant for examination for a license shall furnish, among other things, evidence to the Board that he is a graduate of a chiropractic school or college teaching chiropractic in accordance with the requirements of this chapter. In view of this we are of the opinion therefore that the applicant must, among other things, be a graduate of a chiropractic school or college to entitle him to an examination for a license.

Paragraph two above deals with any applicant who applies for examination to procure a license, who has matriculated after the passage and approval of this chapter (same having been passed in 1927) and requires that he shall furnish satisfactory evidence of his preliminary educational qualifications in addition to those in paragraph one which additional requirements are underscored by us in paragraph two. Certain educational qualifications need also be furnished, among them the fact that the chiropractic course "shall cover a period of not less than three years of nine months each, and requiring actual attendance of not less than 2045 hours which shall be construed as the maximum requirements to practice chiropractic under this chapter." We feel that this paragraph, referring back to paragraph one, makes it mandatory that any applicant since 1927 must have these qualifications in addition to being a graduate as set out in paragraph one to enable him to take the examination. It is our opinion that the statute is poorly drawn and very ambiguous and that the only way it can be construed is under established rules of construction, that is to apply the rule that all parts of an act should be made effective, if possible. Elas v. Montgomery Elevator Co., 50 S.W.(2d) 130, 330 Mo. 596; State ex rel. Mills v. Allen

Dr. S. J. Durham

128 S.W.(2d) 1040, 344 Mo. 743.

It is therefore our opinion, interpreting all parts of the statute together, that the legislative intent in passing the original act and the amendments thereto was that in order to take the examination and obtain a license to practice chiropractic one must be a graduate of a school or college of chiropractic and that in addition thereto must be a graduate of an accredited high school or its equivalent and to have attended a chiropractic school or college for a period of not less than three years of nine months each, requiring actual attendance of not less than 2045 hours to graduate and that it is mandatory that the course shall cover that number of hours to so graduate, take the examination, be licensed and allowed to practice chiropractic in this state.

CONCLUSION

It is therefore the opinion of this department that an applicant for examination for license to practice chiropractic in this state must be a graduate of an accredited chiropractic school or college and that his course shall have consisted of three years of nine months each with actual attendance of 2045 hours to so graduate.

Respectfully submitted,

A. BERTRAM ELAM
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ABE:mw

OLD AGE ASSISTANCE
DEFINED:
SECTION 306, USCA
Title 42:
BOARD OF CHIROPRACTIC
EXAMINERS:

Benefits up to the maximum can be paid to those receiving old age assistance to pay for chiropractic treatment or other remedial care.

FILED
25

July 1, 1952

7-2-52

State Board of Chiropractic Examiners
204½ East High Street
Jefferson City, Missouri

Attention: Dr. S. J. Durham, D.C.
Secretary

Gentlemen:

Your request for an opinion of this department has been assigned to me. Said request reading as follows:

> "This Board has observed in Public Law 734, 81st Congress, Second Session, Section 303-a, Section 6, Social Security Act is amended to read as follows:
>
> 'Definition
>
> "'Section 6. For the purposes of this title, the term "old-age assistance" means money payments to, or medical care in behalf of or any type of remedial care recognized under State law in behalf of, needy individuals who are sixty-five years of age or older, but does not include any such payments to or care in behalf of any individual who is an inmate of a public institution . . . .'.
>
> "It is the Board's opinion that anyone treated by us under the above Section is entitled to compensation for such treatment under the Public Health and Welfare laws of this state.
>
> "We would greatly appreciate an opinion from you as to whether or not we are entitled to this compensation as are doctors, osteopaths and others named under this law."

State Board of Chiropractic
Examiners

Section 6, set out by you above, is now part of Title 42, United States Code Annotated, Section 306, which reads as follows:

> "306. 'Old-age assistance defined
>
> "For the purposes of this subchapter, the term 'old age assistance' means money payments to, or medical care in behalf of or any type of remedial care recognized under State law in behalf of, needy individuals who are sixty-five years of age or older, but does not include any such payments to or care in behalf of any individual who is an inmate of a public institution (except as a patient in a medical institution) or any individual (a) who is a patient in an institution for tuberculosis or mental diseases, or (b) who has been diagnosed as having tuberculosis or phychosis and is a patient in a medical institution as a result thereof."

A reading of this section convinces us that the same was enacted by the Congress of the United States for the purpose of enabling the states to use "Old Age" Assistance funds for medical care. Of course to come under this statute this state would first have to pass legislation providing for these payments to be made as direct payments for "medical care in behalf of or any type of remedial care" the same to be made directly to the persons furnishing same, by the Missouri Department of Public Health and Welfare.

There is no statute of this state at the present time which would authorize our Department of Public Health and Welfare to make the payments heretofore mentioned to the individuals furnishing same to the aged in need of assistance.

The primary rule of statutory construction is to ascertain and give effect to the lawmakers' intent. Norberg v. Montgomery, 351 Mo. 180, 173 S.W.(2d) 387; Wallace v. Woods, 340 Mo. 452, 102 S.W.(2d) 91.

However, Section 208.010, RSMo 1949, reads as follows:

> "In determining the eligibility of an applicant for public assistance under this law, it shall be the duty of the division of welfare to consider and

> take into account all facts and circumstances surrounding the applicant, including his earning capacity, income and resources, from whatever source received, and if from all the facts and circumstances the applicant is not found to be in need, assistance shall be denied. The amount of benefits when added to all other income, resources, support and maintenance shall provide such persons with reasonable subsistence compatible with decency and health. Irregular, casual and unpredictable income received by a claimant from performing odd jobs shall be excluded in calculating income. Benefits shall not be payable to any person who: * * *" (Underscoring ours.)

From what has been said before regarding statutory construction, it is our opinion that the underscored part of the above statute allows the Missouri Department of Public Health and Welfare to increase the amount paid to those eligible for public assistance up to the maximum amount payable where such recipient of public assistance shows a need for the care of a physician, osteopath, chiropractor, chiropodist or nurse where this type of medical care is needed by said recipient. We are forced to this conclusion by the fact that direct payment by the Department of Public Health and Welfare is recognized to such practitioners under Section 306 Title 42, USCA which allows the state Department of Public Health and Welfare to make these payments directly where the state has enacted legislation enabling the Department to so do. We believe, without question, this is true because the Federal statute, supra, recognizes that this type payment can be made as it states: "the term "old age assistance" means money payments to, or medical care in behalf of or any type of remedial care recognized under state law in behalf of, needy individuals who are sixty-five years of age or older, * * *"

CONCLUSION

It is, therefore, the opinion of this department that benefits up to the maximum can be paid to those receiving old age assistance to pay for chiropractic treatment or other remedial care.

Respectfully submitted,

A. BERTRAM ELAM
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ABE:mw

SCHOOLS: County board of education, in making study of school districts and advising with school officials, may evaluate teacher personnel. Said board has no authority to employ a school nurse and assess school's percentage of costs.

FILED
26

April 28, 1952

5/13/52

Honorable J. R. Eiser
Prosecuting Attorney
Holt County
Oregon, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this department, which, in part, reads:

> "1. Under the law relating to the duties of County School Boards is such School Board authorized or privileged to visit the various High Schools for the purpose evaluating the teachers as to their ability and to judge the status of the School by what they hear and observe in the classes they visit?
>
> "2. Under the law may the County School Board employ a school nurse and assess each school using the services of such nurse a percentage of the cost thereof based on the valuation of the various districts?"

In your opinion request you refer to "County School Boards." We assume that you have reference to "County Boards of Education" in each county as set up by the new school reorganization law, and specifically provided for in Section 165.657, RSMo 1949.

The county board of education, like a board of directors of a school district, is a creature of statute, and as such can only exercise such authority as may be expressly conferred by statute or which arises by necessary implication. Thus, in Cape Girardeau School Dist. No. 63 v. Frye, 225 S.W. (2d) 484, 488, the rule is stated as follows:

> " * * * A board of directors is but a creature of statute, and its members can exercise no authority unless the same is either expressly conferred or else arises by necessary implication from the powers that are conferred. * * *"

The appellate courts of Missouri have many times followed the above rule in determining the powers of a board of directors of a school district.

Consequently it becomes necessary to examine the statutes relating to the powers and duties of the county board of education.

Section 165.657, RSMo 1949, et seq., generally provide for the formation of reorganized or enlarged school districts within the counties of the State of Missouri, and among other things provide for the powers and duties to be exercised by the county board of education in connection with the formation of said districts.

Relative to the duties of the county board of education, Section 165.673, RSMo 1949, provides as follows:

> "The county board of education, as provided for in sections 165.657 to 165.670 shall:
>
> (1) Within six months after its organization, make or cause to be made and completed a comprehensive study of each school district of the county and prepare a plan of reorganization. Such study shall include:
>
> (a) The assessed tax valuation of each existing district and the differences in such valuation under the proposed reorganization plan;
>
> (b) The size, geographical features and the boundaries of the proposed enlarged districts;
>
> (c) The number of pupils attending school, average daily attendance, and the population of the proposed enlarged districts;
>
> (d) The location and conditions of school buildings and their accessibility to the pupils;

(e) The location and condition of roads, highways and natural barriers within the county;

(f) The high school facilities of the county and recommendations for improvement of same;

(g) The conditions affecting the welfare of the teachers and pupils;

(h) Any other factors concerning adequate facilities for the pupils.

(2) Upon completion of the comprehensive study, but not later than May 1, 1949, submit to the state board of education, a specific plan for the reorganization of the school districts of the county. Such plan shall be in writing and shall include such charts, maps and statistical information as are necessary to properly document the plan for the proposed reorganized districts.

(3) Continue to study the school system of the county and propose subsequent reorganization plans as conditions warrant.

(4) Cooperate with boards of adjoining counties in the solution of common organization problems, and submit to the state board of education for final decision any and all organization questions on which the cooperating boards fail to agree.

(5) Approve the budget prepared by the county superintendent of schools in cooperation with the clerks of the boards of the several districts and approve the audit, made by the county superintendent, of the expenditures report prepared by the district clerk and submitted for the approval of the state board of education.

(6) Continue to advise with the county superintendent of schools, school patrons, and school officials on all matters pertaining to the improvement of the schools in the county."

We believe that under subparagraphs f, g, h and 6 of the above section the county board of education, if not expressly so, has the implied power, in making a comprehensive study of each school district of the county and in continuing to advise with school officials relative to matters pertaining to improvement of the schools, to visit the various high schools within the county and make its investigation and study of school facilities, which would include teacher personnel.

Therefore, under the powers conferred by statute, we believe that the county board of education would be authorized to visit the various high schools and make the study of the schools in the manner set out in paragraph 1 of your request.

As we read the statutes relating to the duties of the county board of education, they primarily provide for action to be taken by the board in the formation of reorganized or enlarged school districts but do not bestow any supervising control over said districts when formed or over other districts in the county currently in existence. This power is vested in the board of directors of the various districts.

Nowhere in said statutes do we find where the county board of education has the express or implied power to employ a school nurse and assess the schools using the services of such nurse a percentage of the costs to pay for her employment. Inasmuch as we have heretofore pointed out that the county board of education can only exercise such power as is expressly conferred by statute or necessarily arising by implication, we must conclude that it lacks the authority to employ a school nurse in the manner as set out in paragraph 2 of your request.

CONCLUSION

It is therefore the opinion of this department that the county board of education, in making its comprehensive study of each school district and in advising with county school officials on matters pertaining to the improvement of the schools, would be authorized to visit the various high schools within the county and in connection with its study evaluate the teacher personnel of said schools.

Honorable J. R. Eiser

Further, it is our opinion that the county board of education is not authorized by law to employ a school nurse and assess each school using the services of such nurse a percentage of the costs to pay for her employment.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:ml

CITY CHARTER: Amendment: Sections 82.030 and 125.050, RSMo 1949, prescribing the duties to be performed and the form of ballot to be used by the Board of Election Commissioners in submitting proposals to amend the city charter of that city are mandatory.

FILED
26

September 22, 1952

9/24/52

The Board of Election Commissioners
of Kansas City, Missouri
Jackson County Courthouse
Kansas City, Missouri

Gentlemen:

This will be the opinion you requested by letter from this office as to whether the Board of Election Commissioners of Kansas City, Missouri is required to submit propositions proposed by the City Council of said city for amending the charter of said city, and in the form prescribed for the "constitutional ballot", or, if not so required, does said Board have discretion to place such proposed amendments of said charter upon, and in the form prescribed for the "constitutional ballot". Your letter requesting the opinion states:

> "Several charter amendments proposed by the Council of Kansas City are to be submitted to the electors of that city at the ensuing general election, pursuant to section 20, article 6, of the present constitution.
>
> "In the submission of propositions for amending a constitutional city charter, Section 82.030 RSMo 1949, V.A.M.S., provides that 'the form of ballot * * (may be) determined by the board of election commissioners * * in accordance with the election laws of this state applicable to elections held in such cities, as they now are or may hereafter be amended.' Of 'the election laws of this state applicable to elections held in such city' is Section 125.050 RSMo 1949 V.A.M.S. This latter section prescribes a form of the ballot designated as 'constitutional ballot'. Section 125.050 was amended in 1949 (Laws 1949 page 261) by incorporating the following language:
>
> "'Every other proposition, including referendum and initiative measures, to be submitted at the

> general election shall be proposed and submitted on the 'Constitutional ballot,' as herein provided, if any proposed constitutional amendments are submitted at such election or not. * * To vote for any proposed constitutional amendment, propositions, other subjects, measures, including referendum and initiative measures, if any are submitted, the voter shall place an X in the square opposite the word 'For' and if he is opposed to the same, the voter shall place an X in the square opposite the word 'Against.' (Laws 1949 pp 262-263)'

"In view of the foregoing provisions(or any other provisions deemed applicable) is the board required to submit propositions for amending Kansas City's charter upon, and in the form prescribed for the 'constitutional ballot'? If not so required, does the board have discretion to place such propositions upon, and in the form prescribed for, the 'constitutional ballot'?

"Confronted with the immediate necessity of preparing absentee ballots for the ensuing election, the answers to the foregoing questions as soon as may be convenient are respectfully requested."

Section 19 of Article 6 of the 1945 Constitution of Missouri provides that any city having more than 10,000 inhabitants may frame and adopt a charter for its own government, consistent with and subject to the Constitution and laws of this state, pointing out the procedure to be followed thereat.

Section 20 of Article 6 of our said Constitution provides for amendments of city charters already adopted. Said section 20 so providing and pointing out the procedure to be followed in such amendment, or amendments, reads as follows:

> "Amendments of any city charter adopted under the foregoing provisions may be submitted to the electors by a commission as provided for a complete charter. Amendments may also be proposed by the legislative body of the city or by petition of not less than ten per cent of the registered qualified electors of the city, filed with the body or official having charge of the city elections, setting forth the proposed amendment. The legislative body shall at once provide, by ordinance,

> that any amendment so proposed shall be submitted to the electors at the next election held in the city not less than sixty days after its passage, or at a special election held as provided for a charter. Any amendment approved by a majority of the qualified electors voting thereon, shall become a part of the charter at the time and under the conditions fixed in the amendment; and sections or articles may be submitted separately or in the alternative and determined as provided for a complete charter."

The right of a city of more than 10,000 inhabitants to frame and adopt a new charter or to amend its charter is a continuing one.

Our Supreme Court in the case of Morrow vs. Kansas City, 186 Mo. 675, speaking of the right under Section 16 of our Constitution of 1875 to adopt a special city charter being a continuing right, the Court, l.c. 689, said:

> "Such a grant has again and again been held to be a continuing one in our municipal systems. (Farrar v. St. Louis, 80 Mo. 379; McCormack v. Patchin, 53 Mo. 36; Skinker v. Heman, 148 Mo. 355.)"

The Court further held in the same case, l.c. 689 and 690, that such cities had the power under said Section 16 of the Constitution of 1875 to either adopt a new charter or amend an existing charter as a continuing power, and so holding said:

> "But it is urged that the Constitution simply provides for an amendment, and does not contemplate a new freeholders' charter after one has been framed and adopted. We think the section had a twofold object, a plan for creating a new charter and a plan for amending the same. It was left to the cities of over one hundred thousand inhabitants to resort to either, as their necessities might require."

Sections 19 and 20 of Article VI of our present Constitution are the same as were Sections 16 and 17, without substantial change, except population provisions, in the 1875 Constitution of this state.

Section 19 of Article VI provides that cities of qualified population in framing and adopting a charter for their own government must do so consistent with and "subject" to the Constitution and laws

of the state. This means, our Supreme Court said, in Turner vs. Kansas City, et al., 191 S.W.(2d) 612, quoting from another Missouri Supreme Court decision, l.c. 615, the following:

> "'"Subject to," that is, placed under the authority, the dominion of the constitution and laws of the state."' * * *".

The Constitution thus grants to cities of appropriate population the right to frame and adopt a charter, or to amend the same. The State, under its police powers, has basic control over and regulation of proceedings to be observed for holding elections in such cities to adopt or amend charter proposals.

The General Assembly of this State giving authority to such cities to adopt and amend charters, and providing the procedure and details to be followed in elections to adopt or to amend a city charter, and prescribing the form of the ballot to be used to adopt or reject a city charter, or to amend the same, enacted Sections 82.020, 82.030 and 125.050, RSMo 1949, which, respectively, read as follows:

> "82.020. Certain cities may adopt or amend constitutional charter, how
>
> "Any city in this state which now has or which may hereafter have a population of more than ten thousand inhabitants according to the last preceding federal decennial census may frame and adopt or amend a charter for its own government by complying with the provisions of sections 19 and 20 of article VI of the constitution of this state, or any amendments thereof."
>
> "82.030. Election, how conducted
>
> "Notices of any election provided in said sections 19 and 20 of article VI of the Constitution of Missouri, or any amendments thereof, may be given and the form of ballot and details of such election determined, by the board of election commissioners or other officials having charge of municipal elections in said cities in accordance with the election laws of this state applicable to elections held in such cities, as they now are or may hereafter be amended."

Board of Election Commissioners

"125.050. Vote to be by ballot--form--method of marking

"The vote on a proposition to call a constitutional convention or on the adoption of a new constitution, or on any proposed constitutional amendment, shall be taken by ballot. If a proposition to call a constitutional convention is submitted, each ballot shall have printed thereon the words "Shall there be a convention to revise and amend the constitution?' with 'For' and 'Against' to the left thereof, one above the other. If but one constitutional amendment has been proposed by the general assembly or by the initiative, each official constitutional ballot shall have printed thereon the words 'Constitutional Amendment No. 1' followed by the official ballot title as provided for in sections 125.010 to 125.120, and to the left of the official ballot title, the words 'For' and 'Against' one above the other. But if more than one constitutional amendment has been so proposed, then each ballot shall have printed thereon the words 'Constitutional Amendment No. 1,' and so on, setting out the official ballot title of each proposed amendment thereunder and to the left of the official ballot title the words 'For' and 'Against' one above the other, designating in numerical order each proposed constitutional amendment as arranged by the secretary of state. The official ballot title shall be printed with the number of the proposed constitutional amendment on the official ballot and the words 'For' and 'Against' in bold blackfaced type in capital letters not less than eight point in size nor more than ten point in size. At the left of the word 'For' and the word 'Against' shall be placed a small square, not less than one-fourth of an inch in length. The secretary of state shall certify to the different county clerks or other proper officers the form of the official constitutional ballot, containing the numerical numbers and the official ballot title of all proposed constitutional amendments, as provided for in sections 125.010 to 125.120, which shall be printed upon a separate official ballot to be designated 'Constitutional Ballot.' Ballots not printed or prepared as herein required shall not be counted on the proposition thereby submitted.

> The constitutional ballot shall be not less than four inches wide and ten inches long, of the same kind of paper, color and of equal size. Every other proposition, including referendum and initiative measures, to be submitted at the general election shall be proposed and submitted on the 'Constitutional Ballot,' as herein provided, if any proposed constitutional amendments are submitted at such election or not. The clerk of the county court of each county shall provide for each district in his county, and the election commissioners for each election district in their city, a separate ballot box for the deposit and reception of the constitutional ballots. To vote for any proposed constitutional amendment, propositions, other subjects, measures, including referendum and initiative measures, if any are submitted, the voter shall place an X in the square opposite the word 'For' and if he is opposed to the same, the voter shall place an X in the square opposite the word 'Against.' In all other respects the law governing the printing, distribution of ballots, the number to be distributed, and the manner of voting ballots at a general election shall apply to 'Constitutional Ballots' where not in conflict with sections 125.010 to 125.120."

Your letter advises that several charter amendments proposed by the Council of Kansas City, Missouri are to be submitted to the electors of that city at the ensuing General Election pursuant to Section 20, Article 6 of the present Constitution.

As the basis of the two specific questions submitted to us for our opinion your letter referring to said sections 32.030 and 125.050, states:

> "In the submission of propositions for amending a constitutional city charter, Section 82.030 RSMo 1949, V.A.M.S., provides that 'the form of ballot * *(may be) determined by the board of election commissioners* * in accordance with the election laws of this state applicable to elections held in such cities, as they now are or may hereafter be amended.' Of 'the election laws of this state applicable to elections held in such city' is section 125.050 RSMo 1949 V.A.M.S. This latter section prescribes a form of the ballot designated as 'constitutional ballot.' Section 125.050 was amended in 1949 (Laws

1949 page 261) by incorporating the following language:

> "'Every other proposition, including referendum and initiative measures, to be submitted at the general election shall be proposed and submitted on the 'Constitutional ballot,' as herein provided, if any proposed constitutional amendments are submitted at such election or not. * * * To vote for any proposed constitutional amendment, propositions, other subjects, measures, including referendum and initiative measures, if any are submitted, the voter shall place an X in the square opposite the word 'For' and if he is opposed to the same, the voter shall place an X in the square opposite the word 'Against.' (Laws 1949 pp 262-263)"

Sections 82.030 and 125.050 are of "the election laws of this state applicable to elections held in such city" referred to in Section 82.030 itself which must be strictly obeyed in elections "to amend" the city charter of the City of Kansas City.

Pursuant to the provisions of said Sections 82.030 and 125.050, which you quote, in part, you submit the two following questions, to-wit:

> "In view of the foregoing provisions(or any other provisions deemed applicable) is the board required to submit propositions for amending Kansas City's charter upon, and in the form prescribed for, the 'constitutional ballot'? If not so required, does the board have discretion to place such propositions upon, and in the form prescribed for, the 'constitutional ballot'?"

Whatever method may be followed under the noted sections of both the Constitution and our statutes authorizing the submission of questions to the electors of adopting or amending a charter of any such city, all such questions, when proposed by the lawful authority, must be submitted to the electors as specified in said Sections 19 and 20 of the Constitution, on the "constitutional ballot" by the Board of Election Commissioners of any such city. Provision is made in Section 125.050, supra, for the submission of other propositions incident to the governmental affairs of such cities on the "constitutional ballot", whether any constitutional amendments are submitted at said election or not. Said Section 125.050 in this behalf provides the following:

> "* * *Every other proposition, including referendum and initiative measures, to be submitted at the general election shall be proposed and submitted on the 'Constitutional Ballot,' as herein provided, if any proposed constitutional amendments are submitted at such election or not. The clerk of the county court of each county shall provide for each district in his county, and the election commissioners for each election district in their city, a separate ballot box for the deposit and reception of the constitutional ballots. To vote for any proposed constitutional amendment, propositions, other subjects, measures, including referendum and initiative measures, if any are submitted, the voter shall place an X in the square opposite the word 'For' and if he is opposed to the same, the voter shall place an X in the square opposite the word 'Against." * * *."

It will be observed that Section 82.030, supra, provides that:

> "Notices of any election provided in said sections 19 and 20 of article VI of the Constitution of Missouri, or any amendments thereof, may be given and the form of ballot and details of such election determined, by the board of election commissioners * * * in accordance with the election laws of this state applicable to elections held in such cities, as they now are or may hereafter be amended."

It will be further observed that said Section 125.050 prescribes the form of the "constitutional ballot" to be used by the electors in voting upon other propositions submitted as well as proposed constitutional amendments, if any are submitted.

Section 82.030, supra, provides that notices of any election to adopt or amend a city charter may (emphasis ours) be given and the form of ballot and details of such election determined by the Board of Election Commissioners or other officials in accordance with the election laws of this State applicable to elections held in such cities, as such election laws now exist or may hereafter be amended. The section does not otherwise indicate that the Board has any discretion in the performance of its named duties. The use of the word "may" in this section must be construed to mean "shall" as we shall hereinafter point out because the section is dealing with

the powers given to public officers, and which concern the public interest.

This section, however, does require the duties imposed upon the Board to be performed in accordance with the election laws of this State applicable to elections held in such cities, present or future.

Section 125.050 is one of the existing election laws of this State applicable to elections in such cities as Kansas City, Missouri, and, as such, is readily identified, because the section is the only election statute specifically setting up the procedure to be followed in constructing the "constitutional ballot form" for the use of the electorate in voting on the adoption or amendment of city charters as directed in said Section 82.030.

This section provides the form of the "constitutional ballot" with exactness and in detail. It uses, in directing how the form of such ballot shall be constructed, the mandatory word "shall".

Mindful of the requirements in Section 82.030, supra, that the form of the ballot is to be made and the details of such election are to be determined by the Board according to the election laws of this State applicable to elections held in such cities as they now are or may hereafter be amended, and keeping before us the fact that in Section 125.050, supra, itself, it is provided that all these steps "Shall" be taken to submit any of such "other propositions as are therein specified," we believe, reading both Sections, 82.030 and 125.050 together, it is clear that the duties of the Board of Election Commissioners of Kansas City, Missouri, in this matter, with respect to the notice and the form of the "constitutional ballot" and all other duties connected therewith, imposed upon the Board, are mandatory and must be performed by the Board as required in said Section 125.050 in conjunction with Section 82.030, and that the Board is without discretionary powers in the performance of any of such duties.

Authorities in both text and decision support the construction we give to the statutes here being considered, and are in support of the conclusion reached in this opinion that the performance of the duties of the Board of Election Commissioners of Kansas City, Missouri under the noted statutes on the questions submitted are mandatory and that the Board has no discretionary powers in such matters.

We here cite such of said authorities as we believe apply to these questions and which support our views herein expressed on such questions.

Board of Election Commissioners

29 C.J.S. under the title of "Elections", defining the duties of election officers, has this text, l.c. 73:

> "* * *Statutes respecting the duties of public officers in preparing for election are mandatory, and substantial obedience may be required by proper proceedings. Where the duties imposed on a board of election commissioners and the manner of their performance are particularly pronounced in the law, they must be followed or the acts of the board are invalid. * * *."

Supporting this text the Supreme Court of Texas, in the case of Ferguson, et al. vs. McCallum, Secretary of State, 53 S.W. 753, construing a statute of that State, in an election contest, requiring the Secretary of State to certify to County Clerks the names of State candidates within a certain time before the ballots could be printed, and which duty the Secretary of State had fully performed, that Court, holding such election statutes mandatory, l.c. 760, said:

> "* * *It is clear, we think that these statutes are mandatory, in the sense that the candidate and the citizen have rights to be subserved thereby, which may be enforced, and that the statutes should be obeyed."

In the case of State ex rel. Mayer, et al. vs. Schuffenhauer, et al., 250 N.W. 767, speaking of the duties of the Board of Election Commissioners of the City of Milwaukee, Wisconsin, as defined by the statute of that State being mandatory, the Supreme Court of Wisconsin, l.c. 767, said:

> "The power given the board of election commissioners is there plainly set forth. It does not extend beyond that fixed by legislative enactment in the act of its creation. The duties imposed and the manner of their performance being particularly pronounced in the law, they must be followed or the acts of the board cannot be valid. * * *."

29 C.J.S., page 245, under the subject of "Elections", stating that compliance must be had with statutes authorizing the submission of questions or porpositions, has this text:

> "In jurisdictions in which a statutory form for submission of questions or propositions is provided, compliance with such form is essential, * * *."

Board of Election Commissioners

The Illinois case of People ex rel. Sandberg vs. Grabs, 26 N.E.(2d) 494, was before the Supreme Court of that State, in quo warranto, on appeal, on the question of the usurpation by the respondents of the offices of members of the Board of Fire and Police Commissioners of the City of Chicago Heights. The ballot used in the election creating the Board did not conform to the ballot prescribed by the statute. This point was the basis of the proceeding in quo warranto to oust such officers as members of said Board. The respondents contended that there had been a substantial compliance with the statute in the form of the ballot used. The Supreme Court of Illinois, affirming the judgment of the lower court in holding the election void for failure of the election officials to use the ballot prescribed by the statute and ordering ouster of the respondent officers, l.c. 498, said:

> "* * *This court is committed to the rule that where the statute declares the form of the ballot, section 16 of the Ballot law does not apply. The form of the ballot must conform to the statutory mandate, and a failure to observe such provision of the law is a matter of substance and renders the election void. * * *."

The Supreme Court of Missouri has consistently held that the word "may" must be construed to mean "shall" when used in a statute measuring the power given to public officers where the public interest is concerned. The Supreme Court, in the case of State ex rel. Vernon County vs. King, et al., 136 Mo. 309, a case involving the construction of a statute dealing with the right of a public officer to retain certain fees where the word "may" was used in the statute, in deciding the case and holding that in such cases the word "may" means "shall", l.c. 318, 319, said:

> "* * *It is also a well recognized rule of construction that the word 'may' should be interpreted to mean 'shall' when referring to a 'power given to public officers, and (which) concerns the public interest and the rights of third persons, who have a claim de jure that the power shall be exercised in this manner.' Such an interpretation is demanded 'for the sake of justice and the public good.' * * *."

The Vernon County case, supra, is cited and the construction there given the word "may" as meaning "shall" under the conditions existing, was repeated by the Supreme Court in the case of State vs. Bevins, 328 Mo. Rep. 1048, where the Court, l.c. 1050, said:

Board of Election Commissioners

> "* * *The word 'may' is interpreted to mean 'shall' when referring 'to a power given to public officers, and which concerns the public interest and the rights of third persons, who have a claim de jure that the power shall be exercised in this manner.' (State ex rel. Vernon County v. King, 136 Mo. 309, 319, 36 S.W. 681 and 38 S.W. 80.) * * *."

It would be difficult to find a situation where a more pointed or specific case of public interest could be more definitely shown than in this set of circumstances where the exercise of the constitutional right of a city to amend its charter for its own government is involved. Such an amendment, or amendments, either to be adopted or rejected, and the election at which the electors of the city may express their will respecting proposals to amend a city charter in governing themselves is of the highest order of public interest. It is the privilege of the City Council of the City of Kansas City, Missouri to propose amendments of the charter of said city pursuant to Section 20 of Article VI of our Constitution to be submitted to the electors of that city at the ensuing General Election. It is the mandatory duty, we believe, of the Board of Election Commissioners to submit all amendments so proposed to the electors of said city under the provisions of Sections 82.030 and 125.050, RSMo 1949.

CONCLUSION

It is, therefore, considering the premises, the opinion of this Department that the Board of Election Commissioners of the City of Kansas City, Missouri is required to submit propositions proposed by the Council of said city to the electors of such city at the ensuing General Election for amending the charter of said city upon and in the form prescribed for the "constitutional ballot" as provided in Sections 82.030 and 125.050, RSMo 1949, and that said Board does not have discretion to place such propositions on the "constitutional ballot". The form of such ballot prescribed by the statute must be used by the Board in submitting such propositions to a vote of the electors of said city.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GWC:ir

ELECTION RETURNS OF THE CITY OF ST. LOUIS:

In making election returns to the Board of Election Commissioner ballots should be enclosed and sealed in four separate containers as follows: (1) The general blanket ballots together with ballots marked "defective, objected to, or rejected;" (2) The Constitutional Ballots; (3) The Judicial Ballots and; (4) The unused ballots together with the stubs of used ballots.

FILED
26

October 23, 1952 10-24-52

Board of Election Commissioners
City of St. Louis
208 South Twelfth Boulevard
St. Louis (2) Missouri

Attention: Mr. Joseph P. Uxa, Chief Clerk

Gentlemen:

Your request for an opinion of this office concerning the general election laws of Missouri has been received, which request is as follows:

> "At previous November elections it has been the custom of this office to have returns made by election officials in the following manner:
>
> "(1) General Blanket Ballot. In cloth sack having ward and precinct number printed thereon, together with the date of the election. (Section 118.560 provides blanket ballots shall be 'enclosed in an envelope.' Section 111.630 specifies they shall be 'sealed up in a package').
>
> "(2) Unused Blanket Ballots. In a separate sack, together with stubs of voted ballots. (Section 111.450).
>
> "(3) Constitutional Ballot. Placed in cardboard box with date of election, etc., on lid of box. (Section 125.050 provides it be deposited by Judges of Election in a separate ballot box).
>
> "(4) Judicial Ballot. In separate cardboard box.

"Thus making a total of two sacks and two cardboard boxes which must be handled when they are returned in the iron ballot box.

"In the interest of efficiency, we would like to combine some of these returns, if legally possible. Therefore, in your opinion, could all voted ballots, namely, General Blanket, Constitutional, Judicial, be returned in one sack?

"If it is found that the various voted ballots must be returned separately, could the unused blanket ballots and stubs of voted ballots be returned with the Candidates' voted ballots in one sack?"

The first subdivision of your request has to do with the general blanket ballot. Chapter 118, RSMo 1949, deals with registration and elections in the City of St. Louis.

A part of Section 118.560, RSMo 1949, is as follows:

"* * * Immediately after making such proclamation and before separating, the judges shall fold in two folds and string closely upon a single piece of flexible wire, strong string, thread or twine, in the order in which they have been read, all ballots which have been counted by them; separate those marked 'objected to,' 'defective' or 'rejected', unite the ends of such wire in a firm knot; seal the knot in such a manner that it cannot be untied without breaking the seal, enclose the ballots so strung in an envelope, upon which shall be endorsed in writing or print the number of the precinct and the date upon which such election was held; securely tie and seal such envelope with the official wax and impression seals to be provided by the judges, in such a manner that it cannot be opened without breaking the seals and return the ballots, together with the ballots marked 'defective,' 'objected to' or 'rejected' in such sealed package or envelope to the board of election commissioners.* * *"

It is apparent that the Legislative intent here expressed is to the effect that the general blanket ballots actually voted and counted should be sealed, "in an envelope" "together with the ballots marked 'defective, objected to, or rejected.'"

The Legislature by expressing what should be placed in the envelope or package excludes everything else.

The Supreme Court in Keane v. Strodtman, Sheriff, 323 Mo. 161, 18 SW (2d) 896, 898 said:

> "* * * The familiar maxim of 'expressio unius est exclusio alterius' may also be invoked, for the maxim is never more applicable than in the construction of statutes. Whitehead v. Cape Henry Syndicate, 105 Va. 463, 54 S. E. 306; Hackett v. Amsden, 56 Vt. 201, 206; Matter of Attorney General, 2 N. M. 49."

The same principle is announced by the Supreme Court of Missouri en banc in State ex rel vs. Smith 342 Mo. 75, 111 SW (2d) 513, 514 as follows:

> "* * * To uphold appellant in his contention would 'violate the well-known canon of statutory construction, viz. that the expression of one thing is the exclusion of another.' State ex inf. Conkling ex rel. Hendricks v. Sweaney, 270 Mo. 685, loc. cit. 692, 195 S. W. 714, 716."

We are forced to the conclusion that nothing should be included in "the package or envelope" returned to the board of election commissioners except the general blanket ballots voted, and the ballots marked "defective, objected to, or rejected."

We next consider subdivision number three of your request in which you refer to "the constitutional ballots".

Section 125.050, RSMo 1949, deals with the Constitutional Ballot - form and method of marking. This section provides that all constitutional amendments "shall be printed upon a separate official ballot to be designated 'Constitutional Ballot.'"

Said Section 125.050 further provides as follows:

> "* * * The clerk of the county court of each county shall provide for each district in his county, and the election commissioners for each election district in their city, a separate ballot box for the deposit and reception of the constitutional ballots."

It is quite apparent that the Legislature intended that, to a great extent, the Constitutional Ballot should be separate from the other election ballots. It is to be a separate ballot designated "Constitutional Ballot" and a separate ballot box has to be provided "for the reception and deposit of the Constitutional Ballots."

Section 125.060, RSMo 1949, is as follows:

> "The election on such proposed constitutional convention, on the adoption of a new constitution, or on any constitutional amendment or amendments, s hall be conducted and the returns made thereof to the several county clerks, and shall by them be certified to the secretary of state, as provided by law in cases of the election of state officers." (Underscoring ours.)

This section provides that the returns of the Constitutional Ballot shall be made to the several county clerks in the same manner as provided by law in cases of the election of state officers. The statute relating to the election of state officers in St. Louis as we have above indicated, is Section 118.560, RSMo 1949, and sets out the manner in which such ballots should be returned. We have above indicated that nothing should be enclosed with the general blanket ballots voted and those marked "defective, objected to, or rejected."

If the constitutional ballots are to be returned in the same manner as the general blanket ballots, it is the apparent intention of the Legislature that the constitutional ballots should be enclosed and sealed separately from all other ballots.

Subdivision four of your request makes inquiry relative to the return of the Judicial Ballot. Section 29 of Article V of the Missouri Constitution deals with the nonpartisan judicial ballot and selection of judges. You will note that Section 29 (c) (1) Article V of the Missouri Constitution provides that in the selection of judges in the nonpartisan plan, the Consti-

tution requires "a separate judicial ballot, without party designation * * *"

The latter part of Section 29 (c) (2) Article V of the Missouri Constitution is as follows:

> "* * * the judicial ballots required by this section shall be prepared, printed, published and distributed, and the election upon the question of retention of such judge in office shall be conducted and the votes counted, canvassed, returned, certified and proclaimed by such public officials in such manner as is now provided by the statutory law governing voting upon measures proposed by the initiative." (Underscoring ours.)

The statutory law governing the return of measures proposed by the initiative appears in Section 126.090, RSMo 1949. The first part of which section is as follows:

> "The votes on measures and questions shall be counted, canvassed and returned by the regular boards of judges, clerks and officers as votes for candidates are counted, canvassed and returned, and the abstract made by the several county clerks of votes on measures shall be returned to the secretary of state on separate abstract sheets, in the manner provided for abstract of votes for state and county officers." (Underscoring ours.)

This section provides that the ballots shall be counted, canvassed and returned as votes for candidates are counted, canvassed and returned.

The reasoning set out herein in answer to subdivision three of your request should be again applied. By the use of such reasoning here, it is apparent that the judicial ballots should be enclosed in a separate "envelope or package," sealed and returned, to your Board of Election Commissioners.

This leaves subdivision two of your request for consideration, which relates to the unused ballots and stubs of voted ballots.

We call your attention to the latter part of Section 111.450, RSMo 1949, which is as follows:

> "* * * All unused ballots and all stubs as provided for in section 111.430 furnished each voting place shall be returned to the county clerk or board of election commissioners."

Section 111.460, RSMo 1949, is as follows:

> "All unused ballots delivered to the clerk of the county court or board of election commissioners may be distributed to schools in the county if requested by such schools. All unused ballots so distributed shall be stamped 'Void' by the county clerk or clerk performing like duties for cities or counties."

This last section contemplates that your Board of Election Commissioners upon the return of the unused ballots may immediately distribute such ballots to your schools, if requested, after such ballots have been stamped "Void."

The latter part of Section 3, Article VIII of the Missouri Constitution is as follows:

> "* * * All election officers shall be sworn or affirmed not to disclose how any voter voted; provided, that in cases of contested elections, grand jury investigations and in the trial of all civil or criminal cases in which the violation of any law relating to elections, including nominating elections, is under investigation or at issue, such officers may be required to testify and the ballots cast may be opened, examined, counted, compared with the list of voters and received as evidence."

The last quoted section contemplates that the ballots actually cast shall remain closed and sealed unless there is an election contest or a trial in which there is some question relating to the violation of the election laws, then and only then, may the ballots cast be opened for the inspection of anyone.

Section 111.630, 1951 Supplement of RSMo 1949, also provides that in case of contested elections the ballots cast may be opened. It is evidently intended that the unused ballots may be opened by the Board of Election Commissioners immediately upon their return and the general blanket ballots cannot be opened except in case of an election contest.

Under these conditions it would be improper to enclose and seal the unused ballots which may be opened immediately upon their return together with the general blanket ballots which cannot be opened except in case of an election contest.

Board of Election Commissioners

The unused ballots together with the stubs of the used ballots should be enclosed in a separate package.

CONCLUSION

We are therefore of the opinion that four separate containers should be used in returning the election ballots to the Board of Election Commissioners for the City of St. Louis, which ballots should be separated as follows:

(1) The general blanket ballots together with the ballots marked "defective, objected to, or rejected;"

(2) The Constitutional Ballots;

(3) The Judicial Ballots; and

(4) The unused ballots together with the stubs of the used ballots.

Very truly yours,

GROVER C. HUSTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GCH:lw

COUNTY COLLECTORS) Current drainage taxes included in
) determining compensation for mailing
) notice of taxes due.

FILED
28

2-14-52

February 4, 1952

Honorable Bert Femmer
Collector of Revenue
New Madrid County
New Madrid, Missouri

Dear Sir:

We have received your request for an opinion on the question of whether or not county collectors in third and fourth class counties in Missouri are entitled, under the provisions of Section 52.250, RSMo 1949, to receive one-half of one per cent of drainage taxes collected by them as compensation for mailing out statements and receipts to taxpayers, as required by Section 52.230, RSMo 1949.

The provisions in question are as follows:

> Section 52.230. "Beginning with the calendar year 1949, and each year thereafter, collectors of revenue in all third and fourth class counties of the state, not under township organization, shall mail to all resident taxpayers, at least fifteen days prior to delinquent date thereof, a statement of all real and tangible personal property taxes due and which are assessed on the current tax books in the name of such taxpayers. Collectors shall also mail tax receipts for all such taxes received by mail."

> Section 52.240. "The said statement and receipt shall be mailed to the address of the taxpayer as shown by the county assessor on the current tax books, and postage for the mailing of said statements and receipts shall be furnished by the county court; provided, however, that the failure of the taxpayer to receive the notice provided for in this act shall in no case relieve the taxpayer of any tax liability imposed on him by law."
>
> Section 52.250. "The collectors in third class counties shall receive one-half of one per cent and the collectors in fourth class counties shall receive one per cent of all current taxes collected, including current delinquent taxes, exclusive of all current railroad and utility taxes collected, as compensation for mailing said statements and receipts. Said compensation shall be exclusive of and unaccountable in the maximum commissions now provided in sections 52.260 to 52.280."

On April 25, 1950, this office rendered an opinion to Honorable W. H. Holmes, State Auditor, in which we concluded that, in determining the compensation of the county collector under Section 52.250, RSMo 1949, current drainage taxes should be included.

You have submitted to us an opinion by the attorneys for the Little River Drainage District which reaches a contrary conclusion. The attorneys for the Little River Drainage District take the position that the collectors

are not entitled to retain any part of drainage taxes under the above section. They base their opinion on cases in Missouri, including Houck v. Little River Drainage District, 248 Mo. 373, Meier v. City of St. Louis, 180 Mo. 408, Farrar v. City of St. Louis, 80 Mo. 379, and Egyptian Levee Company v. Hardin, 27 Mo. 495, which hold that the taxes which drainage districts are authorized to levy and collect are not within the Missouri constitutional limitations pertaining to taxation. The courts in those cases concluded that the levies are in the nature of special assessments and, therefore, the constitutional provisions did not apply.

We were, of course, aware of the holding of these cases at the time of the preparation of our opinion to the State Auditor. However, we felt then and still feel that these cases are not decisive of the present question.

In construing a statute the primary question is to determine the intention of the Legislature.

Here the Legislature has required the county collectors to send to the taxpayers in their counties statements of all real and tangible personal property taxes due and which are assessed on the current tax books in the name of such taxpayers. The collector is required to mail to the taxpayers receipts for taxes paid by them. The Legislature has provided that, as compensation for these services, the collector shall receive "one-half of one per cent of all current taxes collected, including current delinquent taxes, exclusive of all current railroad and utility taxes collected."

The question is whether or not the Legislature, in using the word "taxes," intended to include drainage taxes. The attorneys for the Little River Drainage District state that the Legislature did not, stating that such levies are not taxes. However, when we turn to statutory provisions dealing with the levy and collection of the so-called drainage assessments, we find that the

Legislature has consistently referred to them as taxes.

Section 242.450, RSMo 1949, provides that the board of supervisors shall "levy a tax" on the property in the district to which benefits have been assessed. The secretary of the board of supervisors is required to prepare a list "of all taxes levied." This list is entitled "Drainage Tax Record of ..... Drainage District ....."

Under Section 242.460, RSMo 1949, the "Drainage Tax Book, ... Drainage District ..... County, Missouri, for the Year 19 ... " is required to be prepared and certified to the county collector each year.

Section 242.540, RSMo 1949, makes it the duty of the county collector of revenue to receive the "drainage tax books" each year and to collect the tax therein set out. "He is further directed and ordered to demand and collect such taxes at the same time that he demands and collects state and county taxes due on the same lands and other property."

Section 242.550, RSMo 1949, provides in part:

> " * * * The said collector shall retain for his services one per cent of the amount he collects on current taxes and two per cent of the amount he collects on delinquent taxes."
>
> (Emphasis ours)

Section 242.560, RSMo 1949, provides the method of collecting delinquent taxes.

Section 242.600, RSMo 1949, provides the procedure for the enforcement of drainage taxes by suit.

In view of the Legislature's consistent use of the words "tax" and "taxes" in Chapter 242, RSMo 1949, we feel that the Legislature in Section 52.250, RSMo 1949, intended to include such taxes in determining the collector's compensation.

As pointed out above, the collector of revenue is required to collect drainage taxes. No official of the drainage district has any authority to receive such taxes. Dalton v. Fabius River Drainage District, 238 Mo. App. 655, 184 S. W. (2d) 776. It seems clear to us that the Legislature, in enacting Section 52.230, RSMo 1949, intended that the collector should render a statement to the taxpayers covering all taxes which the taxpayers were liable to pay, including drainage taxes. In providing for the compensation for the collector's services, the Legislature employed the term "all current taxes collected" and limited this term by excluding "all current railroad and utility taxes."

In view of the consistent legislative reference to the drainage assessments as taxes, we feel that the maxim of construction, expressio unius est exclusio alterius, is applicable and that the Legislature intended to exclude, in determining the collector's compensation, only the railroad and utility taxes and no others received by him. If the Legislature had intended to exclude the drainage taxes received by the collector, we feel that it would have so provided.

CONCLUSION

Therefore, it is the opinion of this department that current drainage taxes are to be included in

Honorable Bert Femmer

determining the collector's compensation under the provisions of Section 52.250, RSMo 1949.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RRW
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STATE MERIT SYSTEM:
FEDERAL SOLDIER'S HOME:

Board of Trustees of Federal Soldiers' Home at St. James authorized to appoint employees when conforming with the State Merit System Act.

FILED
28

October 1, 1952

10-6-52

Board of Trustees
State Federal Soldiers' Home
St. James, Missouri

Attention: Mr. W. W. Jackson, President

Gentlemen:

This will acknowledge receipt of your request for an opinion which reads as follows:

> "The Board of Trustees of the State Federal Soldiers' Home request an opinion setting forth the powers and duties of the Board of Trustees, stating whether section 212.130 is in full force and effect; or whether the Merit System Laws supersede this section."

Section 191.010, RSMo 1949, creates the Department of Public Health and Welfare, and provides that it shall be composed of three divisions, one being the Division of Welfare.

Section 191.070, RSMo 1949 (Section 191.070, Mo. R. S. Cumulative Supp. 1951), further provides that all employees of the Department of Public Health and Welfare, with a few specific exceptions thereto, shall be selected in accordance with the State Merit System Act.

Section 207.010, RSMo 1949, Section 1, provides that the Division of Welfare is an integral part of the Department of Public Health and Welfare and shall exercise all powers and duties necessary to carry out effectively the purposes assigned to it by law. Under Section 2, said Division of Welfare shall be the state agency to administer and have control of the Confederate Home at Higginsville, Missouri, but the Board of Trustees of the Federal Soldiers' Home shall operate and maintain said Federal Soldiers' Home. The Board of Trustees and the Home shall be an integral part of the Division of Welfare and appropriations for the Home shall be made through the Department of Public Health and Welfare.

Furthermore, under Section 212.090, RSMo 1949, said Board of Trustees is required to make annual detailed reports of its work to the Department of Public Health and Welfare.

Under Section 212.030, RSMo 1949 (Section 212.030, Mo. R. S. Cumulative Supp. 1951), the Division of Welfare may employ persons in the same manner as other employees of the Division; however, this authority apparently only applies to employees of the Confederate Home.

Section 212.080, RSMo 1949, creates the Board of Trustees of the Federal Soldiers' Home at St. James, Missouri. Section 212.130, RSMo 1949, subsection 2 thereof, provides that the Board of Trustees shall employ the necessary officers and employees and fix their compensation.

Chapter 36, RSMo 1949, deals with the State Merit System. Subsection 2 of Section 36.030, RSMo 1949, provides that the provisions of said chapter shall apply to all officers and employees of the State Department of Public Health and Welfare.

As we read the foregoing statutes, the question boils down to whether or not such employees of the Federal Soldiers' Home at St. James are in fact employees of the Department of Public Health and Welfare. If they are, then they come under the Merit System; if not, the Merit System will not in any manner affect their employment. The principal function of the Merit System is to examine applicants for certain positions and submit names of the three highest ranking applicants to the party authorized to appoint employees, and in this case, it is the Board of Trustees of said Home who actually select the employees.

One of the primary rules of statutory construction of statutes is to ascertain and give effect to the lawmakers' intent and this should be done from words used, if possible, considering the language honestly and faithfully. (See City of St. Louis v. Senter Commission Co., 85 S.W. (2d) 21, 337 Mo. 238.)

Another well established rule of statutory construction is that statutes relating to the same subject matter are to be considered together and if possible, harmonized and effect given all provisions. (See Whalen v. Buchanan County, 111 S.W. (2d) 177, 342 Mo. 33.)

Applying the foregoing rules of statutory construction, we believe that the Board of Trustees of the Federal Soldiers'

Board of Trustees,
State Federal Soldiers' Home

Home at St. James is vested with the power to appoint necessary employees at said Home; however, it is the duty of the Director of the State Merit System to submit names of qualified employees for any vacancy occurring at said Home, and the Board of Trustees may employ anyone whose name is submitted to said Board. In this manner all of the above provisions can be fairly well harmonized and some meaning given to all.

CONCLUSION

Therefore, it is the opinion of this department that the Board of Trustees of the Federal Soldiers' Home at St. James, Missouri, is authorized to make the appointment of employees of said Home. However, such employment must comply with the State Merit System as provided in Chapter 36, RSMo 1949.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

ok

J. E. TAYLOR
Attorney General

ARH:VLB

TAXES - Owner liable for taxes, : The owner, on the first day of January, of tangible personal property is liable for taxes levied and assessed on such property for the ensuing year.

FILED
30

August 28, 1952

8-29-52

Honorable Henry H. Fox, Jr.
Prosecuting Attorney
Jackson County
Kansas City, Missouri

Dear Mr. Fox:

This will be the opinion you requested, whether individuals and corporations are liable for tangible personal property tax for state, county and school purposes as owners of repossessed automobiles. Your letter requesting the opinion reads as follows:

> "Several credit companies own thousands of automobiles which have been repossessed. They have been to the delinquent personal tax attorney of Jackson County, Missouri requesting receipts in order that they might purchase Missouri state license for such automobiles owned by them.
>
> "Would you please advise whether these individuals and corporations are subject to a personal property tax for State, County and School purposes. In the event this is not necessary it would result in a large loss of revenue."

Your letter states that credit companies in Jackson County own large numbers of repossessed automobiles in your county. Your letter indicates, although it does not so state in terms, that individuals also in Jackson County own certain repossessed automobiles. Section 137.075, RSMo 1949, defines what property by whomsoever owned is liable for taxes and reads as follows:

> "Every person owning or holding real property or tangible personal property on the first day of January including all such property purchased on that day, shall be liable for taxes thereon during the same calendar year."

Sub-section (3) of Section 137.010, RSMo 1949, defines tangible personal property as follows:

> "(3) 'Tangible personal property' includes every tangible thing being the subject of ownership or part ownership whether animate or inanimate, other than money, and not forming part or parcel of real property as herein defined."

Section 137.090, RSMo 1949, requiring all tangible personal property to be taxed in the county in which the owner resides, reads as follows:

> "All tangible personal property of whatever nature and character situate in a county other than the one in which the owner resides shall be assessed in the county where the owner resides, except tangible personal property belonging to estates, which shall be assessed in the county in which the probate court has jurisdiction."

Section 137.095, RSMo 1949, fixing the time for assessment of tangible personal property as the first day of January of the year for which taxes may be assessed, reads as follows:

> "All tangible personal property of business and manufacturing corporations shall be taxable in the county in which such property may be situated on the first day of January of the year for which such taxes may be assessed, and every business or manufacturing corporation having or owing tangible personal property on the first day of January in each year, which shall, on said date, be situated in any other county than the one in which said corporation is located, shall make return thereof to the assessor of such county or township where situated, in the same manner as other tangible personal property is required by law to be returned."

Section 137.120, RSMo 1949, naming items of property as owned by a corporation or individual and required to be listed in a property assessment list, states in sub-section 5 the following:

> "Such lists shall contain:
>
> * * * * * * * * * * * * * * * * * *
>
> "(5) All trucks, motorcycles, airplanes and all other motor vehicles and their value; "

The above-noted and cited sections relating to the levy and assessment of taxes on tangible personal property have been included in our revised statutes for many years. The date of ownership of personal property for assessment thereof until recent years was the first day of June of each year. The date for assessing property for taxes is now, as we have observed in Section 137.075, supra, the first day of January of each year.

The Supreme Court of Missouri construed Section 12756, R.S. Mo. 1919, now Section 137.075, RSMo 1949, supra, in the case of State ex rel. and to the Use of Rudder, Revenue Collector, vs. Haphe, et al., 31 S.W. (2d) 788. Said Section 12756 is quoted by the Supreme Court in its opinion, l.c. 790, as:

> "'Every person owning or holding property on the first day of June * * * shall be liable for taxes thereon for the ensuing year.'"

The Court holding that the owner of property, including, of course, tangible personal property, on the first day of June of each year as the date of ownership for tax assessment purposes, was liable for taxes thereon for the ensuing year further, at l.c. 790, said:

> "From the foregoing it appears that every person owning or holding property on the 1st day of June is liable for the taxes thereon for the ensuing year, that it is the duty of every person to list with the assessor all taxable property owned by him, or under his care, charge, or management, and that personal taxes constitute a debt against the person assessed with such taxes, the person named in the tax bill. * * * ."

The statutes of this State, cited and quoted hereinabove, and the decision by our Supreme Court in the Haphe case, supra, are conclusive authority directing us to hold in this

opinion that credit companies or individuals who are the owners of repossessed automobiles in Jackson County, Missouri, on the first day of January of each year are subject to tangible personal property taxes for state, county and school purposes, and are liable for taxes for such purposes levied and assessed upon such property for the ensuing year.

CONCLUSION.

It is, therefore, the opinion of this Department that credit companies or individuals who are the owners of tangible personal property, including repossessed automobiles, on the first day of January of each year are subject to tangible personal property taxes thereon for state, county and school purposes, and are liable for taxes levied and assessed upon such property for the ensuing year.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GWC:ir

TAXATION:
TANGIBLE PERSONAL PROPERTY:

The "in lieu" provisions in Sections 148.120 to 148.230, RSMo 1949, exempting Credit Institutions from paying tangible personal property taxes are unconstitutional.

FILED
30

November 12, 1952

11/17/52

Honorable Henry H. Fox, Jr.
Prosecuting Attorney
Jackson County
Kansas City, Missouri

Dear Mr. Fox:

This will be the opinion you requested whether Credit Institutions are liable for tangible personal property taxes for state, county and school purposes as owners of repossessed automobiles. Your letter requesting the opinion reads as follows:

> "Several credit companies own thousands of automobiles which have been repossessed. They have been to the delinquent personal tax attorney of Jackson County, Missouri requesting receipts in order that they might purchase Missouri state license for such automobiles owned by them.
>
> "Would you please advise whether these individuals and corporations are subject to a personal property tax for State, County and School purposes. In the event this is not necessary it would result in a large loss of revenue."

Your letter states that credit companies own large numbers of repossessed automobiles in Jackson County, Missouri. Your letter indicates, although it does not so state in terms, that individuals also in Jackson County, as well as credit companies, own certain repossessed automobiles upon which taxes are not paid in your county by the owners.

Correspondence with your office and with counsel for at least one of such credit corporations, and conferences with the delinquent tax attorney for Jackson County, reveal that such credit companies, doing business in Kansas City, Missouri, contend that, as they view the statutes, they are

not liable for ad valorem taxes on their tangible personal property owned by them in this state, including repossessed automobiles, for state, county or school purposes, and state that application has been made by one credit corporation to the County Collector of said Jackson County at Kansas City, Missouri, for a certificate to the effect that no personal property taxes are due on its automobiles in Jackson County, Missouri. Automobiles are, under Subsection 3 of Section 137.010, RSMo 1949, to be defined as tangible personal property. The ultimate purpose of the credit companies being, it is said, if such certificate that no taxes are due be issued and transmitted to the applicant by the Collector, under Section 2 of House Bill 211, enacted by the 66th General Assembly, to use such certificates in the purchase of licenses for the automobiles it operates in the State of Missouri and which it desires to continue to operate in this State.

The County Collector of your county, we are advised, has declined to issue and transmit such certificate or certificates to the credit companies involved.

It is the opinion of this Department, and we so hold, that the County Collector is correct in his interpretation of the taxation law as contained in the Constitution and the statutes of this state, and that the Collector is not required by law to issue such certificates and transmit the same to such companies.

We are informed by counsel for one credit institution that it is their opinion that that credit company, and credit institutions, generally in this state, are "not subject to taxes other than those provided for in Sections 148.120 through 148.230, RSMo 1949."

The particular ground upon which credit institutions rely, it is said, in taking their position, is that they are made exempt from all tangible and intangible personal property taxes and all property taxes on the shares of such credit institutions by Section 148.230 of said Chapter which section reads as follows:

> "148.230. Tax in lieu of certain other taxes.-- It is the purpose of the general assembly to substitute the tax provided by sections 148.120 to 148.230 for all

> taxes on all tangible and intangible personal property of all credit institutions subject to the provisions of said sections and for all property taxes on the shares of such credit institutions."

We observe at once, upon reading said Section 148.230, supra, that it is an "in lieu" or "substitution" statute; in other words, an "exemption" statute.

In the case of "credit institutions" the tax exemption or "in lieu" sections, in particular, are Sections 148.140 and 148.230, RSMo 1949. We have already quoted Section 148.230. Section 148.140, reads as follows:

> "148.140. Credit institutions subject to annual tax--rate--credits.-- 1. Every credit institution as herein defined shall be subject to an annual tax for the privilege of exercising its franchise within the state of Missouri, according to and measured by its net income for the preceding calendar year.
>
> "2. The rate of tax for each taxable year shall be seven per cent of such net income.
>
> "3. Each taxpayer shall be entitled to credits against the tax imposed by sections 148.120 to 148.230 for all taxes paid to the state of Missouri or any political subdivision thereof during the relevant income period, other than taxes on real estate, contributions paid pursuant to the unemployment compensation tax law of Missouri and taxes imposed by said sections."

Section 148.230, supra, exempting Credit Institutions from property taxes on their tangible and intangible personal property has not been construed by the Courts of Missouri as to its constitutionality, nor have any of such "in lieu" sections, exempting other institutions named in said chapter from paying personal property taxes based on value, been construed by our Courts, except Sections 148.370 and 148.240 of said chapter relating to insurance companies.

Honorable Henry H. Fox, Jr.:

We are not concerned here with the terms of the sections of said chapter, except Sections 148.120 to 148.230, affecting credit institutions, and Sections 148.370 and 148.340 relating to tangible and intangible personal property taxes of domestic and foreign insurance companies, respectively. These sections must be considered together in our construction of their related terms in our determination of the questions submitted to us.

We are necessarily concerned with the terms of said Sections 148.370 and 148.340, as the "in lieu" sections exempting insurance companies from the payment of taxes on intangible personal property in Missouri by the payment, in lieu of a property tax, a 2% annual tax on the gross premiums of both domestic and foreign insurance companies, in the construction we must give to the "in lieu" provisions contained in Sections 148.120 to 148.230, relating to Credit Institutions, since our Supreme Court has construed and held invalid the "in lieu" provisions of said Sections 148.370 and 148.340.

The case of General American Life Insurance Company, et al. vs. Bates, et al., 249 S.W. (2d) 458, involving this precise question, was before the Supreme Court of this State for its decision on the validity of such "in lieu" provisions of said Sections 148.370 and 148.340 as exemption statutes relating to insurance companies, as measured by the terms of Section 6 of Article X of the present Constitution of this State. The construction given such statutes and the decision rendered by the Court in such "in lieu" statutes relating to insurance companies, holding such provision invalid, control us here in our construction of the "in lieu" provisions of Sections 148.120 to 148.230 and make it imperative for us to follow the decision of the Court in the General American case, in the preparation of, and to say, in our conclusion to, this opinion, that the "in lieu" provisions of Sections 148.120 to 148.230, provisions of like nature and of like purpose and effect as were the "in lieu" provisions of Sections 148.370 and 148.340, are unconstitutional and void because said "in lieu" sections are in conflict with Section 6, Article X of the Constitution of this State, 1945, which, as said by the Court, quoting from Section 6, l.c. 461, "after enumerating said property as proper subject matter for exemption from taxation, * * * provides:

Honorable Henry H. Fox, Jr.:

> '* * * All laws exempting from taxation property other than the property enumerated in this article, shall be void."

The General American Insurance case was an action filed by the insurance company of that name in the Circuit Court of Cole County, Missouri for a declaratory judgment against the Director of Revenue and another to enjoin the collection of intangible personal property taxes levied against that company.

Another insurance company and others intervened in the case. The Circuit Court of Cole County held the two statutes involved,constitutional. The defendant state officers appealed to the Supreme Court. The opinion is not yet published in the permanent reports, but is reported in the July 29th issue of the S.W. (2d) Advance Sheets. We will refer to and quote here the principal holdings of the Court.

The Court held that intangible taxes of insurance companies were property taxes and that no "in lieu" statute, in effect providing for an excise tax, could create an exemption to relieve such companies from paying intangible personal property taxes by substituting therefor another kind of tax. Subsections 1 and 2 of said Section 148.140 directly provide that the 7% annual tax to be paid by credit institutions in lieu of all other tangible or intangible personal property shall be an excise tax for the privilege of carrying on their business in this State.

The Court, in defining excise taxes, l.c. 462, said:

> "(1-3) We consider the nature of the tax before taking up respondents' cases most directly in point. Taxes fall into three natural classifications; capitation or poll taxes, taxes on property, and excises. * * * Excises include '" * * * every form of taxation which is not a burden laid directly upon persons or property; in other words, excises include every form of charge imposed by public authority for the purpose of raising revenue upon the performance of an act, the enjoyment

> of a privilege, or the engaging in an occupation."' * * *".

Discussing cases cited by respondents, and their effect, the Court, further speaking of excise taxes, l.c. 462, said:

> "(4) Respondents' case of Stouffer v. Crawford, Mo. Sup., 1923, 248 S.W. 581, 585 (10), involved Laws 1919, p. 718, which repealed and reenacted certain sections of the income tax law of 1917, Laws 1917, p. 524, and under Sec. 7, Laws 1919, p. 719, imposed an income tax of 1-½% on corporations, except, so far as involved, 'insurance companies which pay an annual tax on their gross premium receipts in this state.' Foreign insurance corporations were required to pay an annual tax of 2% on premiums received on business done in this state 'in lieu of all other taxes, except as in this article otherwise provided.' Sec. 6387, R.S. 1919, from Laws 1895, p. 198, Sec. 2, Sec. 5958. The statement in Stouffer v. Crawford to the effect that the tax on the gross premium income of insurance companies in lieu of other taxes had been upheld, read in the light of the supporting citations, is not a holding that said tax was in lieu of 'property' taxes. Further, income taxes are not property taxes, and have been considered to be in the nature of an excise tax. 27 Am. Jur. 309, n. 8; 42 C.J.S., Income, page 536; Bacon v. Ranson, 331 Mo. 985, 56 S.W. (2d) 786, 787."

The Court, l.c. 461, referring to and quoting Sections 3 and 4 of the Constitution of 1945, classifying property for taxation, said:

> "Sections 3 and 4 of Art. 10 Mo. Const. 1945, 1 Mo. R.S. 1949, p. 80, bear upon the issues and are quoted here.
>
> > "'Section 3. * * * uniformity * * * Taxes * * * shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. * * * ."

Honorable Henry H. Fox, Jr.:

"'Section 4(a). Classification of taxable property--taxes on franchises, incomes, excises and licenses.--All taxable property shall be classified for tax purposes as follows: class 1, real property; class 2, tangible personal property; class 3, intangible personal property. The general assembly, by general law, may provide for further classification within classes 2 and 3, based solely on the nature and characteristics of the property, and not on the nature, residence or business of the owner, or the amount owned. Nothing in this section shall prevent the taxing of franchises, privileges or incomes, or the levying of excise or motor vehicle license taxes, or any other taxes of the same or different types.

"'Section 4(b) Basis of assessment of tangible property--taxation of intangibles--limitation.--Property in classes 1 and 2 and subclasses of class 2 shall be assessed for tax purposes at its value or such percentage of its value as may be fixed by law for each class and for each subclass of class 2. Property in class 3 and its subclasses shall be taxed only to the extent authorized and at the rate fixed by law for each class and subclass, and the tax shall be based on the annual yield and shall not exceed eight per cent thereof.

"'Section 4(c). Assessment levy, collection and distribution of tax on intangibles.--All taxes on property in class 3 and its subclasses, and the tax under any other form of taxation substituted by the general assembly for the tax on bank shares, shall be assessed, levied and collected by the state and returned as provided by law, less two per cent for collection, to the counties and other political subdivisions of their origin, in proportion to the respective local rates of levy.'"

Honorable Henry H. Fox, Jr.:

The Court held in the General American case, as we have seen, l.c. 462, that the case involved a property tax, expressly so designated in Section 4 of Article X of the Constitution, and made subject to specific constitutional inhibitions. The Court, holding that the "in lieu" provisions in Sections 148.370 or 148.340, could not exempt insurance companies from paying intangible personal property taxes by the payment of the 2% annual gross premium tax, l.c. 464, said:

> "(6,7) We conclude on this the first and principally contested, issue that the 'in lieu' statute contravenes constitutional inhibitions, including that prohibiting the exemption of property from taxation, because:
>
> "Under the 'in lieu' statute no 'tax upon intangible personal property' is exacted of respondents. 'Intangible personal property' constitutes 'Class 3' of the classes of property subject to tax under Sec. 4, quoted supra, of the constitution. The intangible personal property tax act imposes a tax on property. The other two classes of property under said Sec. 4 are 'real property' and 'tangible personal property'; and the General Assembly is authorized to further classify 'tangible' and 'intangible' personal property 'solely on the nature and characteristics of the property' by general law. While 'real property' and 'tangible personal property' are to be assessed on the basis of value, the tax on 'intangible personal property' 'shall be based on the annual yield,' not exceeding 8% thereof. The 2% premium tax of the 'in lieu' statute is not a tax on intangible personal property. Said statute does not classify intangible personal property 'solely on the nature and characteristics of the property.' The tax is not 'based on the annual yield.' It is not a property tax. It is an excise, or occupation, tax, imposed upon the privilege of conducting the business authorized under Arts. 2, 7, 17 and 6, of Ch. 37, R.S. 1939, Sections 376.010 et seq., 379.010 et seq., 379.205 et seq., 381.010 et seq., RSMo 1949,

> V.A.M.S., in this state. * * * This distinction between property and excise taxes is recognized in the provision of said Sec. 4(a) reading: 'Nothing in this section shall prevent the taxing of franchises, privileges or incomes, or the levying of excise or motor vehicle license taxes, or any other taxes of the same or different types.'
>
> "Section 6, Art. 10, Mo. Const. 1945, effects two constitutional classes of property: (1) taxable, and (2) exempt. The 'in lieu' statute Laws 1945, p. 1023, exempts from the intangible personal property tax act, Laws 1945, p. 1914, the intangible personal property of respondents; and in so doing is an unauthorized attempt to reclassify as exempt property not enumerated in said sec. 6 as exempt but which is there constitutionally classified as taxable property. This, it has been held, the lawmaking power may not do. * * * ."

We believe credit companies stand precisely in the same position under Sections 148.120 to 148.230 with respect to the unconstitutionality of the "in lieu" provisions of such statutes as did insurance companies under the "in lieu" provisions of Sections 148.370 and 148.340 which "in lieu" provisions of Sections 148.370 and 148.340 the Court held unconstitutional in the General American case. The attempted exemption of credit institutions and insurance companies from paying tangible and intangible personal property taxes respectively, by reason of such respective "in lieu" statutes express the same intended purpose and effect to exempt such respective institutions and companies from paying property taxes, and to establish such exemptions by such statutes as the public policy of this State.

The Supreme Court in the General American Insurance case, held such "in lieu" statutes unconstitutional on both of two grounds, first, on the ground that the two per cent tax was derived from gross annual premiums, and therefore an excise tax, as held by the Court, and which could not avail as a substitute statute to exempt insurance companies from the payment of taxes on intangible personal property, and, second, that the insurance "in lieu" statutes, 148.370 and 148.340 exempting insurance companies from personal property taxes, are in direct conflict themselves, independently,

with Section 6 of Article X of the present Constitution of this State which expressly prohibits the Legislature from exempting from taxes any property not authorized by name in said Section 6 of Article X. The same result was reached by the Court in either event. And so here, under the clear and comprehensive decision of the Supreme Court in the General American case, where the Court held the "in lieu" provisions of Sections 148.370 and 148.340 unconstitutional, likewise the provisions of Sections 148.120 to 148.230, inclusive, in the Credit Institutions Act, must be and are, upon the same grounds, in our opinion, unconstitutional.

The Court, finally concluding its opinion, l.c. 467, said:

> "Accordingly, the judgment is reversed and the cause is remanded with directions to enter judgment holding the 'in lieu' portion of the statute unconstitutional and the "yield" statute applicable."

Considering the decision of our Supreme Court in the General American case, and the conditions of fact existing in the question submitted to us, and, considering the "in lieu" provisions contained in said Sections 148.120 to 148.230, inclusive, in the Credit Institutions Act of 1946, whereby such provisions exempt from taxation the tangible personal property of credit institutions, by providing for the payment in lieu of such taxes a 7% tax rate in each taxable year upon the net income of such institutions for the preceding calendar year, it is apparent that such "in lieu" provisions contained in said Sections 148.120 to 148.230, inclusive, in the Credit Institutions Act of 1946, are unconstitutional and void, because such provisions are in conflict with Section 6 of Article X of the 1945 Constitution of Missouri. It is plain also that all tangible personal property in this State owned by credit institutions on the first day of January of each year is subject to tangible personal property taxes according to the value thereof under the taxation statutes of this State.

CONCLUSION.

It is, therefore, the opinion of this department, considering the premises, that the in lieu provisions of Sections 148.120 to 148.230, RSMo 1949, exempting tangible personal property of credit institutions from paying personal property taxes are unconstitutional and void; that credit

Honorable Henry H. Fox, Jr.:

institutions owning tangible personal property in this State on the first day of January each year are subject to personal property taxes thereon for state, county and school purposes for the ensuing year.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GWC:mw:irk

COUNTY BUDGET LAW:

Surpluses in Class 1, 2 and 4 may be transferred to Class 5 although the surplus exceeds the fund budgeted under this class.

FILED
31

February 15, 1952

2-15-52

Honorable Robert H. Frost
Prosecuting Attorney of
Clinton County
Plattsburg, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this department. Your request reads as follows:

> "At the request of the County Court of Clinton County, I am requesting your opinion on the proper procedure the Court must take to transfer surplus funds in Classes 1-2-4 to the Contingent Fund in Class 5. Our county has a large surplus in these three funds and also have some legal obligations which could be paid out of Class 5 but there are not sufficient funds in this Class to pay them.
>
> "Your opinion of November 21, 1946 to the Prosecuting Attorney of Lewis County states that this can be done, but our county treasurer refuses to make the transfer on the theory that by doing so we would have to increase our budget in Class 5.
>
> "Will you please let me have your opinion as soon as possible so that we can close this matter before making the new budget."

The County Budget Law (Sections 50.670 to 50.740, RSMo 1949), applicable to third class counties provides that the county court shall prepare a budget of estimated receipts and expenditures for the year beginning January first and ending December thirty-first.

Section 50.670, RSMo 1949, provides in part as follows:

> "* * *The county courts of the several counties of this state are hereby authorized, empowered and directed and it shall be their duty, at the regular February term of said court in every year, to prepare and enter of record and to file with the county treasurer and the state auditor a budget of estimated receipts and expenditures for the year beginning January first, and ending December thirty-first. The receipts shall show the cash balance on hand as of January first and not obligated, also all revenue collected and an estimate of all revenue to be collected, also all moneys received or estimated to be received during the current year. * * *The county court shall classify proposed expenditures according to the classification herein provided and priority of payment shall be adequately provided according to the said classification and such priority shall be sacredly preserved."

Section 50.680, RSMo 1949, provides for Class 5 of the budget as follows:

> "The county court shall next set aside a fund for the contingent and emergency expense of the county, the court may transfer any surplus funds from classes one, two, three, four to class five to be used as contingent and emergency expense. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service (whether salary, fees,

> wages or any other emoluments of any kind whatever) estimated for in preceding classes."

Section 50.710, RSMo 1949, provides:

> "Contingent and emergency expense. - The county court may transfer any surplus funds from class one, two, three, and four to class five to be used as contingent and emergency expenses. Purposes for which the court proposes the funds in this class shall be used shall be shown."

As you have indicated in your opinion request, this department, in an opinion to the Honorable D. W. Wilson, Prosecuting Attorney of Lewis County, November 21, 1946, held that the county court under the provisions of Sections 50.680 and 50.710, RSMo 1949, could transfer surpluses in classes one, two and four to a contingent fund in class five of the budget to pay contingent and emergency claims provided such claims are valid obligations of the county. Apparently the county treasurer of Clinton County refuses to make the transfer on the theory that such a transfer would amount to a revision of the county budget for the year 1951. We believe that such a position is untenable as may clearly be shown by a hypothetical example. Suppose for purposes of simplicity, the estimated receipts of a given year included the unencumbered surplus from the preceding year totalled six thousand dollars, the county court, under the provisions of Section 50.670 is required to draw up a budget based upon the total receipts and expenditures specifying six classes as provided in Section 50.680, RSMo 1949. Now suppose that the county court in considering the estimated receipts and expenditures see fit to allocate one thousand dollars to each of the six classes. Under this scheme one thousand dollars would be budgeted under class 5. Assuming once again that the one thousand dollars in this class had been expended for authorized purposes and there is a surplus in class one, two and four, if the county court could not transfer such surpluses to class five because only one thousand dollars had been budgeted under class five then the provisions of Section 50.680 and 50.710 would be meaningless.

It is a primary rule of construction for which we need cite no authority, that every part of a statute should be given effect if at all possible. It is noted that prior to 1941, there was no provision in the County Budget Law for transferring surpluses from

one class to another. However, the legislature saw fit to allow a greater flexibility in the County Budget Law and authorized such a transfer as are provided in Sections 50.680 and 50.710. We are of the opinion that Sections 50.680 and 50.710, RSMo 1949, is sufficient authorization for such a transfer even though the additional amount was not budgeted under class five. However, such funds must be used for the purposes provided for under class five.

CONCLUSION

Therefore, it is the opinion of this department that the county court may transfer surpluses in classes one, two and four to class five of the budget to pay contingent and emergency claims budgeted under said class although the total expenditures under class five may exceed the original fund provided and budgeted under this class.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DDG:hr

COUNTY COURT:
BOUNTIES:
COYOTES & WOLVES:
SECTION 279.010, RSMo 1949, AS AMENDED, Laws Mo. 1951, BY HOUSE BILL #344:
SECTION 279.030, RSMO 1949, AS AMENDED, LAWS MO. 1951, BY HOUSE BILL #344.

On and after March 18, 1952, the county shall pay the sum of $30.00 for any grown coyote or wolf and the sum of $5.00 for each coyote or wolf pup which may be killed in the county, and the state treasurer shall reimburse the county treasurer two-thirds of all bounties paid by such county.

March 24, 1952

FILED
31

3-25-52

Honorable Gene Frost
Prosecuting Attorney
424 Miner's Bank Building
Joplin, Missouri

Dear Sir:

Your recent request for an opinion has been assigned to me for answer. Said request being as follows:

> "The County Clerk of this county, Claude B. Taylor, has requested that I obtain an opinion from you regarding the amount of bounty to be paid on wolves and coyotes."

Section 279.010, RSMo 1949, originally provided for the payment of bounties on coyotes, wolves and wildcats, however, this section of the statutes has been superseded by House Bill #344, passed by the 66th General Assembly and signed by the Governor on December 13, 1951, which amended this section of the statutes. Said section 279.010, supra, as amended, Laws Mo. 1951, reads as follows:

> "The county court of any county in this state shall pay a bounty of thirty dollars each for any grown coyote or wolf and five dollars each for any coyote or wolf pup which may be killed in such county, also a bounty of five dollars for each grown wildcat, and three dollars for each wildcat kitten which may be killed in such county; provided, that each such bounty shall not be paid for any coyote, wolf, wildcat, the pups of coyotes or wolves or kittens of wildcats which may have been raised in captivity either within or without this state; provided further, that a coyote or wolf pup and a wildcat kitten shall be deemed such when under ten weeks old; provided, also, that it

> shall be unlawful to import into this state any such animals except for exhibition purposes and then only under permit as otherwise provided for by the statutes of this state."

From a reading of the above section of the statute as amended we find that the bounty to be paid for each grown coyote or wolf shall be $30.00 and for each coyote or wolf pup the sum of $5.00. We are of the opinion that the word "shall" as used in the statute as amended is imperative and mandatory. The word "shall" as used in statutes, contracts or the like, indicates that this word is generally imperative or mandatory. Stevens vs. Wurdeman, 295 Mo. 566, 246 S.W. 189, 194.

Section 279.030, RSMo 1949, was also amended by House Bill No. 344, supra, and as revised reads as follows:

> "279.030. The clerk shall preserve all such scalps until the next regular term of the county court, when he shall produce such scalps to the county court and the court shall cause warrants to be made for the amount of bounty due to such claimant and shall forthwith order all such scalps to be destroyed by burning in the presence of the county court. The clerk shall thereupon certify to the state comptroller the name and address of the claimant for such bounty and the amount of bounty paid by the county, which shall be audited by the state comptroller, and upon approval by the state comptroller and the state auditor, the state treasurer shall refund to the treasurer of such county two-thirds of all bounties so paid by such county." (Underscoring ours.)

Further, it is our opinion that these statutes will become effective and operative on and after March 18, 1952, by virtue of Senate Concurrent Resolution #11, passed by the Senate on December 5, 1951, and concurred in by the House on December 12, 1951. Senate Concurrent Resolution #11 being as follows:

> "WHEREAS, Section 29, Article III of the Constitution of 1945 provides that if the General Assembly recesses for 30 days or more it may prescribe by Joint Resolution that laws previously passed and not effective

shall take effect 90 days from the beginning of such recess; and,

"WHEREAS, the Sixty-sixth General Assembly has resolved to recess for a period beginning December 19, 1951, and ending January 21, 1952;

"NOW THEREFORE BE IT RESOLVED by the House of Representatives and Senate jointly that all laws passed by the Sixty-Sixth General Assembly of the State of Missouri on or before the 19th day of December, 1951, and not effective, shall take effect and be in force on the 18th day of March, 1952."

CONCLUSION

It is, therefore, the opinion of this department that the county on and after March 18, 1952, shall pay the sum of $30.00 for any grown coyote or wolf and the sum of $5.00 for each coyote or wolf pup which may be killed in the county and that the state treasurer shall reimburse the county treasurer two-thirds of all bounties paid by such county.

Respectfully submitted,

A. BERTRAM ELAM
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ABE:mw

WITNESS FEES:
MAGISTRATE COURT:

Witnesses attending the magistrate court shall be allowed such fees as are set forth in Section 491.280, RSMo 1949.

March 26, 1952

FILED
31

3-26-52

Honorable Gene Frost
Prosecuting Attorney of
Jasper County
Joplin, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this department. Your request reads as follows:

"At the request of our Circuit Clerk here in Jasper County, I respectfully request a ruling upon the construction of Section 491.280, Revised Statutes, 1949, in regard to Fees of Witnesses in Magistrate Court. We have a copy of your opinion, dated July 25, 1947, in which you hold this fee is $1.00.

* * * * * * * * * * * * *

"The same Clerk also requests a direct ruling upon the taxing of costs for board of prisoner held in the County Jail upon the revoking of a parole, until the Sheriff can take him to the State Penitentiary.

"The State Criminal Cost Clerk has supplied us with a copy of an opinion of the Attorney General, dated August 10, 1939, wherein he rightfully holds that the State is not liable for the expense of returning a prisoner to Johnson County upon revoking a parole. As Section 550.010, provides that board of prisoner shall be

> paid by the State, either upon conviction or acquittal, without exception. This opinion states that in the event of the revoking of a parole the State is liable for the expense of delivering the defendant to the Penitentiary, and we cannot see how the board of the prisoner in the County Jail after revocation of parole pending the delivery to the Penitentiary can be separate from the delivery expense, one as illegal and the other as legal."

Your first inquiry deals with the amount of the fees allowed witnesses for their services in the magistrate court. Section 491.280, RSMo 1949, provides for witness fees as follows:

> "1. Witnesses shall be allowed fees for their services as follows:
>
> (1) For attending any court of record, reference, arbitrators, commissioner, clerk or coroner, at any inquest or inquiry of damages, within the county where the witness resides, each day, one dollar and fifty cents;
>
> (2) For like attendance out of the county where witness resides, each day, two dollars;
>
> (3) For traveling each mile in going to and returning from the place of trial, five cents;
>
> (4) For attending under the law to perpetuate testimony, the same fees as are allowed for attending a court of record in like cases; but witnesses attending in more than one case on the same day and at the same place shall only be allowed fees in one case; and any witness who shall claim fees for attendance in two or more cases on the same day and at the same place shall not be allowed any fees that day.
>
> "Each witness shall be examined on oath by the court, or by the clerk when the

> court shall so order, as to the number of days of his actual necessary attendance, under subpoena or recognizance, and the number of miles necessarily traveled; and in every case where a witness shall not, as such, actually and necessarily attend such court, and withdraw himself from his business during the full time for which pay is claimed, he shall not be allowed for more than one day's attendance."

This section provides that a witness shall be allowed one dollar and fifty cents per day for attending any court of record within the county that he resides and two dollars per day for attending any court of record out of the county where he resides.

Magistrate courts of this state are courts of record. Section 517.050, RSMo 1949, so provides as follows:

> "Magistrate courts shall be courts of record. * * *"

Section 21, Article V, of the Constitution of Missouri, 1945, provides that the General Assembly shall provide for the administration of magistrate courts consistent with this Constitution and since we have been unable to find any provision of law specifically setting out the fee allowed witnesses attending the magistrate court, we are of the opinion that Section 491.280 controls magistrate courts, as courts of record, and witnesses attending said court are entitled to fees therein provided.

The opinion to the Honorable Forrest Smith, State Auditor, July 25, 1947, holding that a witness in the magistrate court was entitled to one dollar for each day in attendance, referred to in your opinion request was based upon Section 20, Article V, of the Constitution of Missouri which provides that until otherwise provided by law the practice, procedure, administration and jurisdiction of magistrate courts shall be as provided by law for justices of the peace, and Section 13420, R. S. Mo 1939, which sets forth the fees allowed witnesses for attending before a justice of the peace. Subsequent to this opinion, Section 13420 was amended by omitting the portion relating to witness fees before a justice of the peace and is now carried in the revision as Section 491.280, RSMo 1949, supra, therefore, said opinion is no longer controlling.

You next inquire as to the state's liability for the board of a prisoner in a county jail after revocation of parole and

prior to delivery to the State Penitentiary. You have referred to an opinion of this department to the Honorable Forrest Smith, State Auditor, August 10, 1939, which holds that in the event a person convicted of an offense, for which the punishment provided is sentence to the penitentiary, is unable to pay the costs, the state is liable for costs incurred in the prosecution up to and including judgment and sentence and the further fee which accrues to the sheriff for transporting the prisoner to the penitentiary under the commitment order, and none other.

We have reconsidered this opinion (copy attached), and believe that it is correct and sufficient to answer your question.

We do not believe that the opinion referred to holds that the fee which accrues to the sheriff for transporting a prisoner to the penitentiary is part of the costs of the prosecution for which the state would be liable if the defendant is unable to pay. Therefore it is not necessary to separate the cost of boarding a prisoner in the county jail and the cost of delivering said prisoner to the penitentiary.

The fee which accrues to the sheriff for transporting a prisoner to the penitentiary is set out and provided by Section 57.290, RSMo 1949. The costs which you have referred to (boarding a prisoner in the county jail prior to delivery to the penitentiary) occur after judgment and sentence, and although the state is liable for the transportation fee by statute (not as part of the costs of prosecution), we are unable to find any provision of law making the state liable for the costs of boarding a prisoner in the county jail after judgment and sentence and prior to delivery to the penitentiary.

CONCLUSION

Therefore, it is the opinion of this department that witnesses attending the magistrate court shall be allowed for their services, the same fees as are provided for witnesses attending any court of record as set forth in Section 491.290, RSMo 1949.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DDG:hr

COUNTY COURTS: Under Section 137.270, RSMo 1949, county courts may not hear and determine allegations of erroneous assessment or mistakes or defects in description of lands after taxes have been paid.

TAXATION:

FILED
33

March 17, 1952

3-20-52

Honorable Roy E. Glidewell
Prosecuting Attorney
Reynolds County
Centerville, Missouri

Dear Sir:

The following opinion is rendered in reply to your recent request reading as follows:

> "An unusual situation has been presented to the County Court of Reynolds County Missouri and said Court thereupon requested this office to obtain an opinion thereon. Hence this office respectfully requests your official opinion in regard to the jurisdiction, if any, that the County Court may have and the legal procedure, if any, that the County Court should follow in re following factual situation:
>
> "One Tony Wolf appeared before the County Court of Reynolds County, Mo., claiming error either in the assessment or collection of certain taxes and stated that on December 27, 1950 he entered the Collector's office of Reynolds County, Mo., and stated he wished to pay the taxes on his land. The Collector thereupon stated the sum due, accepted payment and gave a collectors receipt therefor. The receipt covered taxes paid on certain lands assessed in the name of said Tony Wolf to wit: NE¼ & PT. NW¼ SE¼ & S½ SE¼, Sec. 14, tw. 30, R 2W.
>
> "Then in January 1952 while attempting to pay his 1951 taxes he was informed by the Collector that his 1950 taxes were delinquent.

> "Prior facts were as follows: In 1949 said Tony Wolf sold and transfered above described real estate to one James Olliger. Such conveyance was recorded on 28 December 1949 but no change of ownership was made on the tax books of said County. Hence assessment for 1950 was made in the name of said Tony Wolf.
>
> "In 1949 the said Tony Wolf purchased real estate located in the same County, township and school district and described to wit: NW¼ SE¼ & PT. NE¼ SE¼ & Pt. SW¼ SE¼ & PT SE¼ NE¼ & E½ NE¼ SW¼ & PT. N½ SE¼, Sec. 11, Tw. 30, R2. It is this last described real estate which the said Tony Wolf stated to the County Court that he believed he was paying taxes upon in 1950. This last described real estate is shown on the County books as being tax delinquent.
>
> "The said James Olliger, to the best of the information obtainable by the County Court, has never tendered or attempted to pay the taxes assessed on the first above mentioned real estate.
>
> "The question of the County Court is whether they could entertain jurisdiction, if so for what purpose, and if so, your legal opinion as to the law and procedure."

A reading of the request for an opinion, quoted above, discloses that in 1950 a taxpaper of Reynolds County paid taxes on real property assessed in his name though not owned by him at the time of payment; that the taxpayer, when paying such taxes was laboring under the impression that he was paying taxes on other land he had acquired in 1949 and on which taxes are now listed as delinquent for 1950; that no contention is made by the taxpayer that he was not, in 1950, or now, the owner of the lands which are now listed as delinquent in 1950; that an opinion is desired by the county court of Reynolds County as to what jurisdiction, if any, it may take and for what purpose.

The fact situation involved resolves itself into one where a taxpayer has voluntarily paid taxes on property which he did not actually own at the time of payment. This opinion deals only with the power of the county court of Reynolds County to take action in regard to this matter.

At this point we quote the general rule relative to power of county courts as found in Missouri Electric Power Company v. City of Mountain Grove, 176 S.W. (2d) 612, 352 Mo. 262, l.c. 267:

> "The authorities are uniform to the effect that county courts possess only limited jurisdiction. Outside the management of the fiscal affairs of the county, such courts possess no powers except those conferred by statute."

Section 137.270, RSMo 1949, provides:

> "The county court of each county may hear and determine allegations of erroneous assessment, or mistakes or defects in descriptions of lands, at any term of said court before the taxes shall be paid, on application of any person or persons who shall, by affidavit, show good cause for not having attended the county board of equalization or court of appeals for the purpose of correcting such errors or defects or mistakes. Where any lot of land or any portion thereof has been erroneously assessed twice for the same year, the county court shall have the power and it is hereby made its duty, to release the owner or claimant thereof upon the payment of the proper taxes. Valuations placed on property by the assessor or the board of equalization shall not be deemed to be erroneous assessments under this section."

The above quoted statute contains the only statutory authorization we are able to find permitting the county court of Reynolds County to change the assessment list. The wording of the statute clearly discloses that any action the county court is authorized to take must be taken before the taxes shall have been paid. Facts submitted in the request for this opinion clearly disclose that the taxpayer has voluntarily paid the tax due on the only tracts on which he has erroneously paid a tax. In this situation, the county court of Reynolds County is not in a position to entertain any allegations of erroneous assessment, or mistakes or defects in description of such tracts, such allegations being made with a view to invoking the provisions of Section 137.270, RSMo 1949, cited above.

CONCLUSION

It is the opinion of this department that Section 137.270, RSMo 1949, does not authorize the county court of Reynolds County to hear and determine allegations of erroneous assessment, or mistakes or defects in description of land when such allegations are made after payment of taxes on land involved.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:ba

COUNTY:)
OLD AGE PENSION:) Division of Welfare not required under the law to
DIVISION OF WELFARE:) assume the difference between the old age grant to
) the recipient and the seventy-five dollar monthly
) charge by said home.

FILED
33

August 25, 1952 8/28/52

Honorable Roy E. Glidewell
Prosecuting Attorney
Reynolds County
Centerville, Missouri

Dear Mr. Glidewell:

This will acknowledge receipt of your request for an opinion, which reads:

"This County (Reynolds) is financially distressed, in fact we anticipate difficulty later in the year in paying our County Officials.

"Demands are coming in which are taxing our capacity to pay for such items as funerals, extra expense for the care of Old Age Recipients et cetra.

"Our library is not uptodate and we would be grateful for a prompt official opinion as to whether or not these expenses do not properly lie with the State Welfare Office here otherwise our County will apparently be bankrupt.

"We have a private home here but the lady who operates same demands 75.00 per month for caring for Old Age Recipients but the local Director of Welfare contends that the County must make up the deficit from what they receive and the 75.00. It is our thought that the County is not legally obligated to absorb this extra expense, burial expenses et cetra when the State

> Agency receives funds for this particular purpose. The County is in urgent need of relief from this burden and the writer sincerely trusts that you can furnish us with a prompt official opinion whereby this County can evade these expenses."

Under Section 208.150, RSMo 1949, the maximum amount of old age assistance any one shall receive is fixed so as to not exceed the amount specified in Title I, Federal Social Security Act, or any amendment thereto, as being the maximum amount in which the Federal Government will participate and reads as follows in part:

> "The maximum amount of monthly benefits shall not exceed the following:
>
> "(1) Old age assistance for each person in an amount sufficient to provide a reasonable subsistence compatible with decency and health; provided, however, that such monthly benefits shall not exceed the amount specified in Title I, Federal Social Security Act, or any amendments thereto, as being the maximum amount in which the federal government will participate."

So far as we are able to determine there is no law specifically authorizing the Division of Welfare of the State of Missouri to supplement the old age assistance benefit in an amount, the difference between the grant and the charge of Seventy-five Dollars per month by the operator of said private home.

The Division of Welfare being a creature of statute possesses only such authority as is granted by the statute and that necessary implied power to carry out such express power. (See Lamar Township v. City of Lamar, 261 Mo. 171, l.c. 189.)

The only possible way the Division of Welfare could pay this cost would be under general relief program, and in such instance there is no way to compel such additional expenditure.

Honorable Roy E. Glidewell

CONCLUSION

Therefore, it is the opinion of this department that the Division of Welfare is not required under the law to assume the difference between the old age grant to the recipient and the Seventy-five Dollars monthly charge by the proprietor of a private home who cares for old age recipients.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARH/fh

COUNTY COURTS:
COUNTY ROADS:

In the absence of a county highway engineer and the unavailability of a county surveyor, the county court may appoint any one who is a competent engineer to assist the county court in the formulation of a county road improvement and construction program to be presented to the state highway commission for securing state aid in the improvement and construction of county roads.

FILED
33

September 10, 1952

9-11-52

Honorable R. M. Gifford
Prosecuting Attorney
Sullivan County
Milan, Missouri

Dear Sir:

Your recent request for an official opinion has been received by this office. You thus state your opinion request:

> "The County Court of Sullivan County, Missouri, desires your opinion with reference to the procedure necessary to be followed under the provisions of R. S. Mo. 1949, Sections 231.440 to 231.500 inclusive and specifically Section 231.470 in which is set out the directions as to the use of the County Highway Engineer in the construction of King Bill Roads. Specifically the Court finds itself in the position where the Highway Engineer has resigned, the County Surveyor prefers not to act and they desire to appoint the foreman of the road and bridge crew to act as supervisor of county aid projects if such is permissible."

Section 231.470, RSMo 1949, to which you call attention, reads as follows:

> "The county court of each county desiring to avail itself of the benefits of sections 231.440 to 231.500 shall, with the advice and assistance of its county highway engineer, or if none, of its county surveyor, formulate a program for the improvement, construction, reconstruction, or restoration of county roads, as provided for in sections

> 231.440 to 231.500, for the period for which funds are appropriated out of the county aid road fund. Such program, together with specific plans, specifications and estimates for each project included in said program, shall be submitted to the state highway commission for approval, within the period for which the funds are appropriated out of the county aid road fund. If such program and the plans, specifications, and estimates for each project submitted, comply with the provisions of sections 231.440 to 231.500 and with the general plans, specifications, and requirements formulated as provided in sections 231.440 to 231.500, the same shall be approved by the state highway commission, and it shall so notify the comptroller who shall thereupon certify his approval of the incurring of obligations for the payment of, and shall encumber and set aside proportionate shares of the funds apportioned to such county in amounts on account of each project included in said program, which amounts shall not exceed fifty per cent of the total cost of such projects and in no event shall exceed the sum of seven hundred and fifty dollars per mile of the county road included in each project. Any funds appropriated out of the county aid road fund shall not be expended for the acquisition of right of ways."

It will be noted that this section provides that the county court of a county desiring to participate in the road program provided for in Section 231.440, RSMo 1949, et seq., may, with the advice of and assistance of its county highway engineer, or if there be no engineer, then its county surveyor, formulate a program consisting of plans, specifications, and estimates for each road project in such county program. Your problem is that you do not have a county engineer and that your county surveyor does not care to act in this capacity, and your county court desires to appoint the foreman of the road and bridge crew to act as supervisor of the county aid projects. Can this be done?

Section 231.470, supra, names only the county highway engineer and the county surveyor in this connection. We cannot believe, however, that this statute is one of absolute limitation in this respect because if it were, it would mean in those cases such as yours, where neither a county highway engineer

nor a county surveyor were available, there could be no county participation in this road program. Certainly, such was not the intention of the Legislature which enacted Section 231.470, supra.

We direct your attention to Chapter 229, RSMo 1949, which chapter is entitled "Provisions Relating to All Roads," and to paragraph 4 of Section 229.040 of that chapter, which reads:

> "On completion of the work a detailed statement of the cost shall be filed as in section 229.050 provided, and shall be recorded in the book wherein are recorded contractors' bids; when any pay rolls or construction accounts are certified to as correct by the engineer in charge of the work, the bills for the same shall be passed upon by the county court, township board or district commissioner, and if found correct, shall be paid; provided, that all such work shall be done under the supervision and direction of the county highway engineer, or some other competent engineer employed by the county court or other proper authority, at such compensation as may be agreed upon, payable wholly or in part out of the particular fund to be expended on said construction, reconstruction or other improvement."

We believe, therefore, that your county court could designate the road bridge foreman to act in this capacity if he is a competent engineer, as provided by the above quoted section and as is obviously contemplated by Section 231.470, supra. It is obvious from Section 231.470, supra, that it would take a person with a certain amount of engineering ability to render the services which are necessary in order for a county to present its road program to the state. If your county road and bridge foreman does not possess these qualifications, it is our belief that it would be within the province of your county court to employ some individual to do this work who does possess these qualifications.

CONCLUSION

It is the opinion of this department that in the absence of a county highway engineer and the unavailability of a county surveyor, the county court may appoint any one who is a competent

Honorable R. M. Gifford

engineer to assist the county court in the formulation of a county road improvement and construction program to be presented to the state highway commission for securing state aid in the improvement and construction of county roads.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

HPWab

APPROVED:

J. E. TAYLOR
Attorney General

TAXATION: Under Section 165.083, RSMo 1949, county clerks required to extend all tax levies for school purposes in separate columns of tax book.
COUNTY CLERKS:

FILED
33

September 23, 1952

9-23-52

Honorable R. M. Gifford
Prosecuting Attorney
Sullivan County
Milan, Missouri

Dear Sir:

The following opinion is rendered in reply to your request which reads as follows:

> "The County Clerk of Sullivan County, Missouri, requests your opinion with reference to the question of whether or not he is under a duty to extend in a special column any special levy of tax properly voted by the residents of a reorganized school district situate in Sullivan County, Missouri. The Clerk states that it has been his practice to extend in one column of the taxbooks the levy as set by the Board of Directors and to include therein any special levy that may have been voted by the residents in an election held for that purpose."

Section 137.290, RSMo 1949, provides, in part, as follows:

> "* * * The clerk of the county court in each county, upon receipt of the certificates of the rates levied by the county court, school districts and other political subdivisions authorized by law to make levies or required by law to certify levies to the county court or clerk of the county court, shall then extend the taxes in the assessor's book, in proper columns prepared for such extensions, according to the rates levied; * * *" (Underscoring ours.)

Tax levies for school district purposes are based on an annual estimate made by the board of directors of a school district under authority contained in Section 165.077, RSMo 1949, which provides as follows:

> "The board of directors of each school district shall, on or before the fifteenth day of May of each year, forward to the county superintendent of schools an estimate of the amount of money to be raised by taxation for the ensuing school year, and the rate required to produce said amount, specifying by funds the amount and rate necessary to sustain the school or schools of the district for the time required by law or authorized by the qualified voters of the district, to meet principal and interest payments on the bonded debt of the district, and to provide such funds as may have been ordered by the qualified voters of the district for other legitimate district purposes, including the purchase of school building sites, buying or erecting school buildings, repairing and furnishing such buildings, and providing foot bridges across running streams."

Section 165.083, RSMo 1949, a statute particularly applicable to duties of the county clerk in extending school tax levies on the tax books provides, in part, as follows:

> "Upon receipt of the estimates of the various districts, the county clerk shall proceed to assess the amount so returned on all taxable property, real and personal, in each district, as shown by the last annual assessment for state and county purposes, including all statements of merchants in each district of the amount of goods, wares and merchandise owned by them and taxable for state and county purposes; provided, the levy thus extended shall not exceed in any one year the following rates on the hundred dollars assessed valuation; for sinking fund, forty cents; for interest fund, the number of cents necessary to produce the amount required to pay the interest on the bonded debt of the district; for other funds, eighty-nine cents in the city of St. Louis, one dollar in other districts formed of cities and towns, sixty-five cents in all other districts, and such additional rate or rates in each case as may have been legally authorized by the qualified voters of the district; all of which shall be extended by the county clerk

> upon the general tax books of the county for said year in separate columns arranged for that purpose; * * *." (Underscoring ours.)

In the case of the St. Louis & San Francisco Railway Company v. Gracy, 29 S.W. 579, 126 Mo. 472, the Supreme Court of Missouri was construing Section 8000 R.S.Mo. 1889. Now such section has been brought forward in our subsequently revised statutes and is found at Section 165.077, RSMo 1949, quoted supra, and which provides for the school districts annual estimate. Although Section 8000, R.S.Mo. 1889 has undergone some minor changes since 1889, as of said date, the statute did require that the estimate should state "clearly the amount deemed necessary for each fund, and the rate required to raise said amount." In the Gracy case just cited, the railroad involved criticized the mode of taxation of its property under the estimates in that instance because the estimates submitted, omitted to state the total amount of the funds required for the several purposes of taxation. The Supreme Court disposed of this contention in the following language found at 126 Mo. l.c. 483:

> "We consider the failure to state, in the estimates, the amount of the taxes, or of the several funds required, as in case at bar, a mere irregularity, not going to the substance of the tax, where the rate of the tax is stated, and the valuation of the property for taxation in the several districts is already known and determined."

We do not deem it necessary to cite additional authority holding that the tax levy to be extended on the tax books by the county clerk for school purposes must conform with the estimate required by Section 165.077, RSMo 1949, supra. The language contained in Section 165.083, RSMo 1949, quoted above, discloses that all levies for school purposes should be extended in a separate column, appropriate to each levy, in the tax book.

CONCLUSION

It is the opinion of this department that tax levies for school purposes to be extended in the tax book by the county clerk under authority contained in Section 165.083, RSMo 1949, must be extended in separate columns appropriate to each separate levy authorized.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:lw

CHIROPRACTIC BOARD OF MISSOURI:

The Chiropractic Board of Missouri has the authority to hire an investigator, to be paid by a legislative appropriation out of the Chiropractic Board fund, to assist the Chiropractic Board in carrying out the duty imposed on it to investigate all members of their profession who are charged with or suspected of immoral or illegal actions.



February 14, 1952

2-14-52

Honorable Vernon H. Grogan, D.C.
Treasurer, State Board of Chiropractic Examiners
413a Court Street
Fulton, Missouri

Dear Sir:

Your request for an official opinion has this day been assigned to me to answer. You thus state your opinion request:

> "As a member of the Chiropractic State Board of Examiners, I have an obligation to my profession and to the people of Missouri. Knowing something is one thing and being able to prove it is another thing. It is upon these facts that the following requests are based.
>
> "One--Would it be legal for the Legislature to appropriate (give consent to use a given amount of available State Board Funds) a given amount of money specified for the purpose of hiring an investigator or detective?
>
> "Two-- Would it be legal for the State Board to employ an investigator or detective to investigate and bring in new evidence against a chiropractor who has had a complaint filed against him and pay for same from fund created by the legislature for that purpose?
>
> "Three-- Would it be legal for the board to employ an investigator or detective to investigate a chiropractor who has not had a direct complaint filed against him--- this being done because the board has reason to believe said chiropractor is violating the law?

Honorable Vernon H. Grogan, D.C.

> "Four---Could this fund be set up so as to include witness fees?
>
> "If at all possible would appreciate an opinion before the appropriation committee returns for committee meetings February 4th."

We would first direct your attention to Paragraph 3 of Section 331.030, RSMo 1949, which reads:

> "There shall be paid by each applicant, a fee of twenty-five dollars, fifteen dollars of which shall accompany the application, and the balance of ten dollars shall be paid upon the issuance of a license. All moneys collected under the provisions of this chapter shall be payable to and collected by the division of collection in the department of revenue and shall be deposited in the state treasury to the credit of the chiropractic board fund which is hereby established. Any person failing to pass such examination may be re-examined within one year from the time of such failure without additional fee."

You are correct in assuming, as you do, that any money used by the Chiropractic Board from the fund thus set up would have to be by an appropriation act of the Legislature.

We would now direct your attention to Paragraph 1 of Section 331.060, RSMo 1949, which reads:

> "It shall be the duty of the board of chiropractic examiners to carefully investigate all charges of immoral or illegal actions of anyone to whom a license to practice chiropractic in this state has been issued. Upon complaint being made to the board it shall investigate and if it deems probable cause exists for the complaint, shall furnish a copy of the complaint to the accused by registered mail, together with a notice of the time and place for the hearing of same, which shall not be less than thirty days after the depositing of said communication in the United States mail."

The above section gives to the Chiropractic Board broad powers of investigation of members of its profession who are charged with, or who are suspected of, immoral or illegal actions. Indeed, the above section imposes upon the Chiropractic Board the duty to make these investigations.

The general question which you ask us is whether the Legislature may appropriate, out of the Chiropractic Board fund, a sum of money to be expended in paying an investigator, hired by the Chiropractic Board, for the purpose of making these investigations.

Certainly paragraph 1 of Section 331.060, supra, does not, on its face, authorize the Chiropractic Board to hire such an investigator, or the Legislature to appropriate money out of the Chiropractic Board fund for such a purpose. If, therefore, the Chiropractic Board and the Legislature do have this power, it must be by implication.

As bearing upon this question, we direct your attention to the case of State v. Wymore, 132 S.W. (2d) 979. At l.c. 987 and 988, the Court stated:

> "It will not be necessary to consider the above noted conflict, for it is provided in Sec. 11316, R.S. 1929, Mo. St. Ann. Sec. 11316, p. 600, that 'the prosecuting attorneys shall commence and prosecute all * * * criminal actions in their respective counties * * *.' The section does not enter into detail about the duties of a prosecuting attorney. In this situation the rule is stated as follows:
>
> "'The duties of a public office include those lying fairly within its scope, those essential to the accomplishment of the main purpose for which the office was created, and those which, although incidental and collateral, serve to promote the accomplishment of the principal purposes.' 46 C.J. Sec. 301, p. 1035.
>
> "'The rule respecting such powers is, that in addition to the powers expressly given by statute to an officer or a board of officers, he or it has, by implication, such additional powers, as are necessary for the due and efficient exercise of the powers

> expressly granted, or as may be fairly implied from the statute granting the express powers.' Throop's Public Officers, Sec. 542, p. 515.
>
> "'Necessary implication and intendments from the language employed in a statute may be resorted to ascertain the legislative intent where the statute is not explicit, but they can never be permitted to contradict the expressed intent of the statute or to defeat its purpose. That which is implied in a statute is as much a part of it as that which is expressed. A statutory grant of a power or right carries with it, by implication, everything necessary to carry out the power or right and make it effectual and complete, but powers specifically conferred cannot be extended by implication'. 59 C.J. Sec. 575, pp. 972, 973; Hudgins v. Mooresville Consol. School Dist., 312 Mo. 1, 278 S.W. 769; State ex rel. Wahl v. Speer, 284 Mo. 45, 223 S.W. 655; In re Sanford, 236 Mo. 665, 139 S.W. 376."

We would also direct attention to the case of Bradford v. Phelps County, 210 S.W. (2d) 996. At l.c. 1000, the Court stated:

> "Of course, the Legislature could have provided for salaries for stenographers of prosecuting attorneys in counties of the class including Phelps County, quite as have been provided by statute in counties of other classification. For example, see Laws of Missouri, 1945, pp. 574, 578, and 583, Mo. R.S.A. Secs. 12906 et seq., 12957 et seq., 13547.353 et seq. The Legislature has not done so. This does not mean the County Court of Phelps County should not, in the exercise of its discretion, make allowance for the expense of necessitous stenographic service to the prosecuting attorney. But, in the absence of legislation providing a salary or allowance for a stenographer or for stenographic service for the prosecuting attorney of Phelps County, the County Budget Law means the County Court of Phelps County has the power to make whatever allowance for stenographic service as it, in its discretion, may deem necessary with a regard to the efficiency of the prosecuting attorney's office, and to the receipts estimated to be available

> for that and other estimated expenditures, in short to approve such an estimate as will promote efficient and economic county government. To put it in another and summary way--since Prosecuting Attorney could not rely on a statute particularly providing pay for his stenographic service, he should have necessarily expected such an allowance as the County Court of Phelps County in the honest, nonarbitrary performance of its duty under the County Budget Law would make. County Budget Law, supra, particularly Sections 10912 and 10917."

At l.c. 1001, the Court stated:

> "We have noticed the Legislature has seen fit to delegate to the county court discretionary powers and duties under Section 10917 of the County Budget Law--the county court can be said to be 'the agency most familiar with the fiscal affairs and financial condition of the county' (State ex rel. Dietrich v. Daues, supra; State ex rel. Dwyer v. Nolte, supra), as well as the agency most likely to soundly budget estimated receipts and expenditures to the end of efficiency and economy in county government. It seems the county court's exercise of its discretion in the performance of its statutory and discretionary duty should not be interfered with, vacated or set aside, except in a case where it is clear the county court in acting abused or arbitrarily exercised its discretion (or if such were the charge, acted fraudulently or corruptly)."

We would also direct attention to the case of Culver v. Smith, 74 S.W.(2d) 754, a case decided by the Supreme Court of Texas in 1934. At L.c. 757, the Court stated:

> "We do not interpret the act as authorizing the absolute, unlimited, or unreasonable examination of the books and records required to be kept; nor the unreasonable inspection of the properties therein described. In interpreting

> the act to determine whether it confers arbitrary or unreasonable power, it must be considered in the light of the broader powers exercised by the Commission in the regulation of the petroleum industry under the Conservation Laws. When so considered the act simply provides that the Commission do the acts or things required when 'deemed necessary' and as often as deemed necessary in the enforcement of the Conservation Laws, thus invoking the administrative discretion of the Commission. By the term 'administrative discretion' is meant that the acts or things required to be done may be reached, in part at least, upon the basis of considerations not entirely susceptible of proof or disproof and at times which, considering the circumstances and the subject-matter cannot be supplied by the Legislature itself. A statute is said to confer such discretion when it refers the commission or officer for the exercise of the power to beliefs, expectations, tendencies instead of facts, the commission or officer being usually instructed to act, or to do the things required when deemed 'fit,' 'proper,' 'appropriate,' 'practicable,' 'necessary,' 'reasonable,' or like terms. This discretion includes all matters or things in which the ascertainment of a fact is legitimately left to administrative discretion which enlarges as the element of future probability preponderates over that of present conditions, the fundamental purpose of an administrative power or regulation being to fill up details which arise in the course of the performance of the act or duty specified or required. United States v. Grimaud, 220 U.S. 506, 31 S. Ct. 480, 55 L. Ed. 563; Wayman v. Southard, 10 Wheat. 1, 6 L. Ed. 253; Freund On Administrative Powers Over Persons and Property, 71."

We would also direct your attention to the case of Ravettino v. City of San Diego, 160 P. (2d) 52, a case decided in 1945 by the District Court of Appeal of the Fourth California District. At l.c. 57, the Court stated:

> "In general, powers given to municipal corporations include the further power to employ such modes of procedure as are appropriate

> and necessary for their effective exercise. The delegation of power to municipal corporations, without providing the mode for carrying such power into effect, impliedly gives them the right to select lawful and reasonable means whereby that power is to be carried out. All doubts as to the propriety of means used in the exercise of an undoubted municipal power should be resolved in favor of the municipality, where there is no abuse of power or discretion. * * *"

In view of the above it would appear to us that the Chiropractic Board of Missouri would have the power to hire an investigator, to be paid by a legislative appropriation out of the Chiropractic Board fund, to aid the Chiropractic Board in the discharge of the duty imposed upon it by the Legislature in paragraph 1, Section 331.060, supra, which duty is in general to investigate members of the chiropractic profession who are charged or who are suspected of immoral or illegal actions, and that the Legislature would have the power to make such an appropriation.

In our consideration of this matter, we cannot overlook what we deem to be its practical aspect. There are in the state of Missouri approximately 1250 licensed chiropractors scattered throughout the state. The Chiropractic Board consists of five members. It may be assumed that these five members were chosen to be members of the Chiropractic Board because of eminence in their profession. Being eminent, it may therefore be assumed that they are busy with their professional activities and cannot, without great personal sacrifice, devote much of their time to traveling about the state conducting investigations, nor can they be expected to do so. If, therefore, adequate investigation is to be made, it would appear that it would have to be done by a hired investigator. Furthermore, in view of the fact that the board members are generally well-known to the members of their profession, they would be greatly impeded in making a personal investigation.

The appropriation could include necessary traveling expenses and compensation to be paid witnesses who, in the opinion of the Chiropractic Board, are necessary for a full and complete hearing against members of the chiropractic profession who are charged with immoral or illegal actions. It may be added further, that the witnesses contemplated herein are only such witnesses as are requested by the Board to appear and not to any

witnesses whom the accused person may desire to have present in his behalf. We may further point out that all such witnesses summoned by the Chiropractic Board will be those who voluntarily appear, since the Chiropractic Board does not have the power to obtain witnesses by subpoena. The case of State ex rel. Hurwitz, v. North, 264 S.W. 678, holds that a Board does not have the power to obtain witnesses by subpoena unless that power is by the Legislature conferred upon it.

CONCLUSION

It is the opinion of this department that the Chiropractic Board of Missouri has the authority to hire an investigator, to be paid by a legislative appropriation out of the Chiropractic Board fund, to assist the Chiropractic Board in carrying out the duty imposed on it to investigate all members of their profession who are charged with or suspected of immoral or illegal actions.

Respectfully submitted,

APPROVED:

J. E. TAYLOR
ATTORNEY GENERAL

HUGH P. WILLIAMSON
Assistant Attorney General

HPWab

COUNTIES:
CARE OF INSANE PERSONS:
COLLECTION OF EXPENSES:
FOR MAINTENANCE OF INSANE PERSONS:
PROBATE COURT:

County expenses incurred in support and maintenance of an insane person may be recovered by the county from such insane person's guardian and curator or administrator.

February 18, 1952

FILED
35

Honorable Phillip A. Grimes
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion of this department, the pertinent part of which is as follows:

> "The situation has arisen here in Boone County, as I am sure it has in other counties, in which incompetent persons confined in the state hospitals at county expense later come in to possession of funds which might be used to repay the county for the expense theretofore spent. Frequently the guardian is anxious to use these funds for that purpose.
>
> "We have such a case now in which a ward has been maintained at county expense for over 35 years and has recently come in to possession through a litigation windfall of approximately $900.00. The question for which I request an answer from your office is as follows:
>
> > "'Is it permissable for the county to accept reimbursement for this expense, the guardian being willing? Is it proper for the Probate Court to approve the guardian settlement in making such payment to the County?'"

Section 202.260, RSMo 1949, reads as follows:

> "In all cases of appropriation out of the county treasury for the support and maintenance or confinement of any insane person, the amount thereof may be recovered by the

> county from any person who, by law, is bound to provide for the support and maintenance of such person, if there be any of sufficient ability to pay the same, and also the county may recover the amount of said appropriations from the estate of such insane person."

The above set out statute allows the county to submit a bill covering the expenses of over thirty-five years rendered in favor of the indigent insane person mentioned in your letter who has been paid for by the county for that time. Of course this is to be an itemized bill and no doubt will amount to much more than the $900.00 in the estate of the deceased indigent insane person. This bill should then be attached to a claim and presented to the administrator of the deceased's estate as any claim would be and should be allowed by the probate court. Of course we realize that if the court allows the claim and it is much in excess of the $900.00 in the estate all that the county can hope to recover is the $900.00 at most.

You cite me the cases of Montgomery County v. Gupton, administrator, 139 Mo. 303; and Chariton County v. Hartman, 190 Mo. 71, both of which cases hold that the county cannot recover from the guardian, curator or administrator of an insane person. This was true in the days when these cases were decided because of the fact the statute under which they were decided was different from what it is at present. In these cases decided under the Revised Statutes of 1889, (Section 5557), the statute read as follows:

> "'In all cases of appropriations out of the county treasury for the support and maintenance or confinement of any insane person, the amount thereof may be recovered by the county from any person who by law, is bound to provide for the support and maintenance of such person, if there be any of sufficient ability to pay the same.'"

The statute was not amended until 1927 when it was enacted in its present form by adding the words "and also the county may recover the amount of said appropriations from the estate of such insane persons," which addition to the statute is the reason for our holding here that the county's expenses incurred in behalf of the indigent insane during his lifetime or after his death could be obtained during his lifetime from the guardian and curator of the said indigent insane person or by a claim filed with his executor or administrator after his death, but as we have suggested

the submission of the county's itemized bill to be allowed by the probate court as in all claims in probate estates.

In the case of Barry County v. Glass, 160 S.W.(2d) 808, the Springfield Court of Appeals held that the county could recover and said at l.c. 809:

> "Section 500 of the 1939 Revision of our Statutes reads as follows: 'In all cases of appropriation out of the county treasury for the support and maintenance or confinement of any insane person, the amount thereof may be recovered by the county from any person who, by law, is bound to provide for the support and maintenance of such person, if there be any of sufficient ability to pay the same, and also the county may recover the amount of said appropriations from the estate of such insane person.' (Italics ours.) The same provision is contained in Section 501, R.S. 1929, and that provision was in full force and effect when Glass was confined in the State Hospital at Nevada, Missouri, as a county indigent patient, and, under that section, the estate of Charles W. Glass, an insane person, was clearly liable for the money previously paid out by Barry County."

CONCLUSION

It is therefore the opinion of this office that the claim of a county for its expenses incurred in the support and maintenance of an insane person can be collected from the insane person's guardian and curator or the administrator of an insane person's estate under Section 202.260, RSMo 1949, as now enacted.

Respectfully submitted,

A. BERTRAM ELAM
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ABE:mw

OFFICERS:
COUNTY CLERK:

County clerk who holds over after January 1, 1950, holds office until his successor is appointed and qualified or until 1952, when his successor is elected and qualified.

March 11, 1952

FILED
35

Honorable Friend B. Greene
Prosecuting Attorney of
Shannon County
Eminence, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this department which request reads as follows:

> "Willard Swiney was elected as County Clerk of Shannon County, at the General Election held for the year 1950. He did not qualify - his Commission was never delivered to him.
>
> "Robert L. Cowan, the incumbent held over, as County Clerk, under the provisions of Section 51.020 RS 1949.
>
> "Under these circumstances your opinion is asked as to whether Cowan's term will expire on the 31st day of December, 1952 or December 31st 1954."

Section 51.020, RSMo 1949, provides for the election and term of office of county clerks as follows:

> "At the general election in the year 1946, and every four years thereafter, the qualified electors of the county at large in each county in this state shall elect a clerk of the county court, who shall be commissioned by the governor

> and who shall hold his office for a term of four years and until his successor is duly elected or appointed and qualified. Each clerk of the county court shall enter upon the duties of his office on the first day of January next after his election; provided, that the term of office of persons holding the office of clerk of the county court at the time this section shall take effect shall not be vacated or affected thereby."
>
> (Underscoring ours.)

Section 12, Article VII, of the Constitution of Missouri, 1945, provides as follows:

> "Except as provided in this Constitution, and subject to the right of resignation, all officers shall hold office for the term thereof, and until their successors are duly elected or appointed and qualified."

Section 105.010, RSMo 1949, provides:

> "All officers elected or appointed by the authority of the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified."

Under the provisions of Section 12, Article VII, of the Constitution, Section 51.020 and Section 105.010, RSMo 1949, the person who held the office of county clerk in 1950 and who now fills that office, holds the office because his successor elected at the general election in 1950 failed to qualify.

The general rule of law in such cases is found in 46 C.J., Officers, Section 111, page 969 as follows:

> "In many states it is provided by the Constitution or by statute that officers shall hold over after the expiration of their terms until their successors are elected or appointed and have qualified. Under a provision that officers shall hold over until their successors are "elected"

> and qualified, the officer holding over is in all respects a de jure officer, and the expiration of the term does not produce a vacancy."

See also 43 American Jurisprudence, Public Officers, Section 161, pages 19 and 20.

The above rule is adopted by the courts of this state. In State ex inf. Hulen v. Brown, 274 S. W. 965, 220 Mo. App. 468, the Kansas City Court of Appeals said at page 967 (S.W.):

> "The law is well settled that where a public officer is elected or appointed to hold office for a definite period, and until his successor is appointed or elected and qualified, failure to appoint or elect a successor at the end of such period does not work a vacancy. State ex rel. Lusk, 18 Mo. 333; State ex rel. Stevenson v. Smith, 87 Mo. 158. It follows that the incumbent properly holds until his successor is elected or appointed and qualified, and it is then only that his term expires. State ex rel. Robinson v. Thompson, 38 Mo. 192; State ex rel. v. Ransom, 73 Mo. 78.
>
> "The law under which appellants were appointed fixed their terms of office at one year, and contemplated that at the end of that time new appointments would be made. But, since the appointing power might not be properly exercised, to prevent a vacancy the law provided for the incumbents to hold over until their successors were appointed and qualified. This is a wise rule as applied to public officers, for thereby the public is protected from possible evils naturally attendant upon a situation wherein neglect and waste might result. This contingency, as contemplated by law, enters into every such appointment, and it must be concluded that the time an incumbent holdsover the designated period is as much a part of his term of office as that which precedes the date when the new appointment should be made. The authorities are uniform on this rule, and we think there can be no question about it."

In the case of Langston et al. v. Howell county, 79 S.W. (2d) 99, the appointment of a county highway engineer for a period of one year was considered. In that case a new highway engineer was not appointed after the expiration of the one year term. The Supreme Court of Missouri held, even in the absence of language in the appointment to the effect that said appointment extended until a successor was appointed and qualified, that said county highway engineer was entitled to hold his office until his successor was appointed and qualified.

We feel that it is necessary to here point out that the term vacancy, as used in the portion quoted from C. J., supra, and in the case of State ex inf. Hulen v. Brown, supra, is intended to mean an absolute vacancy where no one is or could occupy the office and discharge the duties of said office. It does not mean a vacancy in the sense that the office should, as provided by law, be filled by appointment or election notwithstanding the fact that the incumbent is holding over.

Section 51.090, RSMo 1949, provides the proper procedure in case of a vacancy in the office of clerk of the county court and reads as follows:

> "When any vacancy shall occur in the office of clerk of the county court by death, resignation, removal, refusal to act, or otherwise, it shall be the duty of the governor to fill such vacancy by appointing some eligible person to said office, who shall discharge the duties thereof until the next general election, at which time a clerk shall be chosen for the remainder of the term, who shall hold his office until his successor is duly elected or appointed and qualified, unless sooner removed."

Section 105.030, RSMo 1949, provides for the filling of vacancies in any state or county office originally filled by election as follows:

> "Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office originally filled by election by the people, other than the office of lientenant governor, state senator, representative, sheriff or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such

> appointment, continue in such office until the first Monday in January next following the first ensuing general election - at which said general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election; provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold such office until such other date."

In the case of State of Missouri ex rel. Bothwell v. Green, 352 Mo. 801, a county collector was elected at the general election in 1942 for a term to commence March 1, 1943. Said collector died December 25, 1942, before the expiration of his current term and before he had qualified for the succeeding term. On December 30, 1942, the governor made an appointment to fill the vacancy created by the collector's death for the term ending March 1, 1943, after March 1, 1943, the appointee held over in office and the question presented to the court was whether the appointee could hold over until a successor was elected at the general election in 1946, or until the general election in 1944, a question almost parallel to the one presented here. The court in its decision stated that Section 11509 R.S. Mo. 1939, now Section 105.030, RSMo 1949, quoted above, must be read in conjunction with the statute on collectors. Stating that there was clearly a vacancy (as distinguished from absolute vacancy, since the appointee was here occupying the office), the court said:

> "Applying the provisions of Section 11509 to this case we find: a vacancy occurred upon the death of Greer, the vacancy was filled by the appointment of Hazel Palmer, her term under the appointment expires at the day designated for the beginning of the term, that is March 1, after the first ensuing general election, namely the general election to be held in November, 1944; and her successor should be elected to serve the remainder of the term at the general election in November, 1944.

* * * * * * * *

> "The legislative policy for filling vacancies has been described by the learned Judge White in State ex inf. Barrett v. McClure, 299 Mo. 688, 253 S. W. 743. That case construed Section 11509 and held it plainly provided an election may be had for an unexpired term and the governor would have no authority to make an appointment which would conflict with such provision. Judge White then stated: 'Originally special elections were provided for to fill vacancies, so as to cut short the tenure of appointees. Apparently the expense and trouble of having special elections to fill vacancies caused the legislature in 1879 to provide for vacancies to be filled by appointment until the next succeeding general election. This shows that the legislative policy of the state has been to fill a vacancy for an elective office by election as soon as practicable after the vacancy occurs.'"

Since Section 51.090, supra, is a statute dealing only with vacancies in the office of clerk of the county court, we believe that it should receive the same interpretation as Section 105.030, (11509 R. S. Mo. 1939) in the Bothwell case. Especially enumerated in Section 51.090 as grounds for a vacancy to be filled by appointment are "death, resignation, removal, refusal to act, or otherwise." It is a familiar rule of statutory construction that in arriving at the intention of the legislature an act should be considered as a whole. State ex rel. McKittrick v. Caroline Products Co., 346 Mo. 1049, and the obscurity of a word or phrase may be removed by reference to associated words. O'Malley v. Continental Life Insurance Co., 335 Mo. 1115. The terms death, resignation and removal denote an absolute vacancy not one which must be determined by court action. Construing the term "refusal to act" with the preceding terms, we believe that it was intended to mean a refusal to qualify, since Section 51.270 provides that a refusal to act when in office shall constitute a misdemeanor for which the clerk can be removed by proper proceeding under Section 51.250.

Therefore, having determined that under Section 51.090, a vacancy exists in the office of clerk of the county court of Shannon County, we are of the opinion that the incumbent now holding over will hold the office until his successor is appointed, qualified and commissioned or until a successor is elected, qualified and commissioned at the general election held in 1952 by virtue of Section 51.090.

Honorable Friend B. Greene

CONCLUSION

Therefore, it is the opinion of this department that the incumbent county clerk now holding over in office by virtue of a vacancy created by the county clerk's elect refusal to qualify will remain in office until such time as his tenure is terminated by the appointment and qualification of a successor under the provisions of Section 51.090, or until his successor is elected at the general election held in 1952, commissioned and qualified.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DDG:hr

PROBATE COURTS: INSANITY HEARINGS: COSTS: HOW TAXED:

Under Sec. 458.080, RSMo 1949, court to order insanity hearing costs paid from insane's estate if sufficient. If insufficient to order county to pay costs; to follow procedure under Sec. 202.160, R.S.Mo 1949. If person discharged to order costs paid by informant, under Sec. 458.090, court cannot legally accept costs from informant or any other person. Under Sec. 49.270, county court can accept for county, reimbursement of amount of maintenance of indigent insane in state hospital when made by one not legally, liable for insane's support, and not from insane's estate.



June 10, 1952

6-11-52

Honorable Philip A. Grimes
Prosecuting Attorney of Boone
County
Columbia, Missouri

Dear Sir:

Your request for a legal opinion of this department has been received and reads as follows:

> "Enclosed herewith you will find a letter dated March 21, 1952 from the Honorable Howard B. Lang, Probate Judge of Boone County, Missouri.
>
> "He is seeking some information with reference to the handling of funds as concerns the county and the Probate office. This letter, I think will be self-explanatory. One of his questions, as I see it, is would the Probate Court be acting properly and without any personal liability if he accepted the costs of an incompetency hearing from the persons requesting such hearing, and then, directly disburse this cost out of the proper parties, such as physician, attorney without ever disbursing this money into the county treasury?
>
> "Another aspect of the same question is if this cost is charged to the county and paid out by the county treasurer would the Probate

> Court be acting properly, provided the people are willing to pay the same, if he accepted their gift or donation of the amount of money and then deposited it to the credit of the county. I believe the Probate Judge would prefer the first method in that he would like to handle the money himself and not run it through the county treasury. It should be understood clearly, however, that he is going to have a separate account and keep accurate and complete books on it, which would remain part of the Probate records.
>
> "Another question as I see it is, that in the event a person is adjudged incompetent and is sent to a state institution as a county patient, can the county accept a donation or contribution of the amount which the county pays for such county patient, to-wit: a $6 a month maintenance as reimbursement; I would appreciate your answer to the above questions."

Section 458.020, RSMo 1949, authorizes sanity hearings to be had in probate court and provides the procedure to be followed. Said section reads as follows:

> "If information in writing, verified by the informant on his best information and belief, be given to the probate court that any person in its county is an idiot, lunatic or person of unsound mind, and incapable of managing his affairs, and praying that an inquiry thereinto be had, the court, if satisfied there is good cause for the exercise of its jurisdiction, shall cause the facts to be inquired into by a jury; provided, that if neither the party giving the information in writing, nor the party whose sanity is being inquired into call for or demand a jury, then the facts may be inquired into by the court sitting as a jury."

Section 458.080, RSMo 1949, provides when the county shall be liable for the payment of the costs of holding a sanity hearing, and reads as follows:

> "When any person shall be found to be insane according to the preceding provisions, the costs of the proceedings

> shall be paid out of his estate, or, if that be insufficient, by the county."

Section 458.090, RSMo 1949, provides when the costs of the sanity hearing shall be paid by the informant, and reads as follows:

> "If the person alleged to be insane shall be discharged, the cost shall be paid by the person at whose instance the proceeding is had, unless said person be an officer, acting officially according to the provisions of this chapter, in which case the cost shall be paid by the county."

In the event the person whose sanity is being inquired into is found to be insane, indigent, and a fit subject to be sent to a state hospital for treatment, Section 202.160 RSMo 1949, sets out the procedure to be followed, and what the court's order shall contain. Said section reads as follows:

> "If, after such examination, the court or the jury, if one shall have been employed, shall be satisfied of the truth of the facts set forth in the statement, the court shall cause a suitable order to be entered of record, upon its own decision, or, where the verdict of the jury has been rendered, upon the verdict. And such order shall further set forth that the person found to be insane is a fit subject to be sent to a state hospital, naming the particular hospital, to undergo treatment therein; and shall further require the medical witness forthwith to make out such a detailed history of the case as is required by section 202.200; and, also, that the costs of this examination be paid out of the treasury of the county; thereupon, the clerk or judge of the court shall forthwith issue a certified copy of the court's order and commitment, and deliver the same to the officer or person who is to transmit such patient to such hospital. The clerk or judge shall, thereupon, in due season, for conveyance of such person to the state hospital by the appointed time, issue his warrant to the sheriff of his county, or any other suitable person, commanding him forthwith to arrest such insane person

> and convey him to the state hospital designated in the order. If the clerk or judge be satisfied of its necessity, he may authorize one or more assistants to be employed."

It is noted that your first question deals with the subject of the costs of insanity hearings and specifically inquires whether the court may legally accept the costs from persons requesting the hearing, (whom we take to refer to informants) and then if the court is authorized to: (1) pay the costs to each person to whom costs are due by reason of the hearing, (2) or if the county court may accept the costs and pay it to the county treasurer who would then pay it to those entitled to costs.

In regard to the subject of costs in civil proceedings (and in the case of Terry v. Holtcamp, 51 S.W. (2d) 13, it was held that an insanity proceeding was a civil, rather than a criminal proceeding) it has long been the rule that costs are matters governed by statute. In the case of Ex Parte Nelson, 253 Mo. 627, the court said at l.c. 628:

> "At common law no costs were recoverable. (City of St. Louis v. Meintz, 107 Mo. 611.) Costs in Missouri being therefore, purely creatures of the statute, enactments in relation thereto must be strictly construed. (State ex rel. v. Seibert, 130 Mo., l.c. 217; St. Louis & Gulf Railway Co. v. Cape Girardeau, etc, Railway Co. 126 Mo. App. 272; Lucas v. Brown, 127 Mo. App. 645.)"

In the case of In Re Thomasson, 159 S.W. (2d) 626, in discussing the subject of costs, the court at l.c. 628 said:

> "Assuming, even, that a court may enter a judgment for costs though dismissing or abating the cause for want of jurisdiction (Ensworth v. Curd, 68 Mo. 282; State v.Thompson, 81 Mo. 163), yet we are of the opinion that the circuit court had no jurisdiction to enter a judgment for the costs against the estate of Thomasson, after the entry of appearance by the administratrices now representing Thomasson and yet one of them being the informant in the principal proceeding and his adversary in the ninety-day trial on the pleas to the jurisdiction. The parties do not cite us to a statute or a case specifically covering a situation such as we have here. In the first place costs were unknown to the common law and one's right to costs is now wholly dependent on statutory provisions allowing them. And such statutes are strictly construed. 7 R.C.L. Sec, p. 781; Van Trump

v. Senneman, 193, Mo. App. 617, 187 S.W. 124; Ex parte Nelson, 253 Mo. 627, 162 S.W. 167. There being no statute specifically allowing costs in such instances or under such circumstances or in such a manner is sufficient to exclude the claims of the appellant. City of St. Louis v. Meintz, 107 Mo. 611, 18 S. W. 30; State ex rel. Clarke v. Wilder, 197 Mo. 27, 94 S.W. 499. Our statutes governing insanity proceedings, such as were instituted here (Art. 18, Ch. 1, Sections 447-508. RS Mo. 1939, Mo. St. Ann. Sections 448-507, pp. 280-304) allow costs paid out of an alleged insane person's estate when he 'shall be found to be insane, according to the preceding provisions' and if he be discharged the costs are to be paid by the informant. Sections 453, 454, R.S. Mo. 1939, Mo. St. Ann. Sections 454, 455, p. 286. And so, there being no statute fitting the facts of this case there would be no jurisdiction to award costs as was done, presumably by piecing several statutes together and giving them a most liberal construction."

(Underscoring ours.)

In view of the holdings in the above quoted cases and statutes, it appears quite clear how the costs of an insanity proceeding shall be taxed.

In the event the person whose sanity is being inquired into is found to be insane by a jury, or by the court sitting as a jury, and the court finds that the insane person has an estate and is financially able to pay the costs, then it shall be the duty of the court to order the costs of the proceedings paid by the curator of the estate of the insane person under the provisions of Section 458.080, supra. However, if the court finds that the estate of the insane person is insufficient to pay the costs, then it shall be the further duty of the court to so state in his order and proceed in the manner provided by Sections 458.080 and 202.160, RSMo 1949, supra.

In the event the alleged insane person is not found to be insane by either a jury, or the court sitting as a jury, then it becomes the duty of the court to discharge said person and to order the informant to pay the costs of the proceeding, as provided by Section 458.090, supra.

It is our thought that upon the specific findings of fact having been made in either instance under the provisions of above

statutes, that it is the mandatory duty of the court to order the costs to be paid from the estate of the insane person, by the county, or by the informant, as the case may be. The payment of costs cannot be ordered paid by any other person, officer or corporation, and it appears to us that if the court were to accept cost donations from the informants in an insanity proceeding that the court's order would be required to show (under the above statutes) against whom the costs had been taxed.

Such a proceeding for the payment of costs as suggested in your letter is not authorized by above statutes, and, in the Thomasson case cited above where it was suggested to the court that costs of an insanity proceeding could not be taxed in a manner different from that provided by specific statutes governing the procedure, and we repeat what the court said regarding the matter:

> "And so, there being no statute fitting that the facts of the case there would be no jurisdiction to award costs as was done presumably by piecing several statutes together and giving them a most liberal construction."

Therefore, in answer to your first inquiry, for the reason given above, it is our thought that the probate court of your county lacks the power to accept the costs of an insanity proceeding pending before him when such costs are tendered to him by the informants, or others and upon acceptance to order:

(1) Said costs paid out directly to those entitled to costs in the proceeding;

(2) To order said costs paid to the county treasurer, who will in turn pay them to those entitled to costs in the proceeding.

It appears that in taxing the costs of such hearings the court must strictly follow the procedure outlined in above cited statutes, and has no power or authority to follow any other procedure than that provided by said statutes.

We have given it as our thought above in answer to your first inquiry that the probate court cannot legally accept the costs of and insanity hearing from the informant or others for the purpose of (1) paying the costs directly to those entitled to them or of (2) paying the costs to the county treasurer, who in turn would pay them to those entitled to said costs. In this connection it is our further thought that the court cannot legally accept a cost donation of an insanity hearing from any person for any purpose, but that the county is not precluded from accepting a donation of costs of such a hearing from the informant or others.

Section 49270, RSMo 1949, among other things provides that the county court is authorized to accept donations of any property, real or personal, for the use and benefit of the county, and reads as follows:

> "The said court shall have control and management of the property, real and personal belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods, or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."
>
> (Underscoring ours.)

It is noted that the provisions of Section 49.270, supra, places no limitations or conditions upon the power of the county court to accept donations of property for the benefit of the county, and in the absence of same it appears that the county court is thereby the benefit of the county.

Therefore, it is our thought that the probate court cannot legally accept the costs of an insanity hearing from the informant or any other person, but the costs of such proceeding may be donated to the county by the informant or others, and under the provisions of Section 49.270, supra, the county court is authorized to accept such donation for and on behalf of the county.

In the second inquiry the facts involved in the hypothetical case are these: One is adjudged insane and committed to the state hospital for treatment as a county patient and, query: "can the county accept a donation or contribution of the amount which the county pays for such county patient, to-wit: a $6 a month maintenance as reimbursement?"

It is noted that neither the inquiry or the facts upon which it is based state by whom the donation to the county might be made, whether from the curator of the insane person's estate; some other person legally liable for his support, or whether by some person, or from some other source not legally responsible for the support of the insane person.

In the event the inquiry was meant to refer to those instances when the donation to the county might be made by the curator, from

the estate of the insane person, or by someone legally liable for his support, then it is believed that the opinion of this department furnished to you on February 18, 1952, fully covers the matter of inquiry and we refer you to that opinion for further consideration.

In the event the inquiry was meant to refer to those instances when the proposed donation or reimbursement to the county is to be made by someone other than the guardian and curator of the person and estate of the insane person, who is not legally liable for the support of such person, then a different aspect of your second inquiry is presented for our consideration.

The donation to the county of six dollars per month for the maintenance of a county patient in a state hospital, paid by a county as referred to in your second inquiry, is in the same class as all other donations tendered to the county, under the provisions of Section 49.270, supra. For the reasons given above, and which we find unnecessary to repeat here, it is our thought that the county court may legally accept, for the benefit of the county, the donation of six dollars per month as reimbursement for that amount which the county has been required to pay for the maintenance of a county patient in a state hospital.

Therefore, our answer to your second inquiry is in the affirmative.

CONCLUSION

It is therefore the opinion of this department that in taxing the costs of an insanity hearing when the alleged insane person is found to be insane and is committed to a state hospital for treatment it shall be the duty of the probate court to tax the costs of the proceeding, and order same paid by the curator out of the estate of the insane person if said estate is sufficient, but if said estate is insufficient the court shall tax said costs against the county, as provided by Section 458.080, RSMo 1949, and in making such finding and order, the court shall follow the procedure provided by Section 458.090, RSMo 1949. That the above cited sections provide the complete statutory method for the taxing of costs of an insanity proceeding in probate court, and such court lacks the power and cannot legally accept the costs from the informant or any other person, but must follow the statutory procedure for the taxation of costs in said insanity proceedings. However, the costs of such proceeding may be legally donated to the county under the provisions of Section 49.270 RSMo 1949, and may be accepted by the county court for and on behalf of the county.

Honorable Philip A. Grimes

It is the further opinion of this department that a county court, under the provisions of Section 49.270, RSMo 1949, may accept a donation, or reimbursement on behalf of the county of the amount the county is required to spend for the maintenance of an indigent insane person in a state hospital when said donation is made by one not legally liable for the support of the insane person, and when the donation is from some other source than the estate of such insane person.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PNC:hr

TAXES: Delinquent, Land Sales : Taxes are not delinquent on forest croplands if a sum in lieu of such taxes is paid to counties in which such lands lie from the Forest Croplands Fund. Such lands may not be sold on account of taxes so relieved.

FILED
35

September 3, 1952

9-4-52

Honorable Friend B. Greene
Prosecuting Attorney
Shannon County
Eminence, Missouri

Dear Mr. Greene:

This will be the opinion you requested from this office, respecting the character of delinquent taxes upon which a County Collector may advertise and sell lands classified as forest croplands under Chapter 254, RSMo 1949--our State Forestry Law. Your letter requesting the opinion states:

> "A situation has come up in our county with relation to forest crop lands - those lands on which the State of Missouri makes up a part of the taxes lost by reason of the reduction in taxes that are collected during the running of the 20 years while the lands are under the program. Some tracts under this program are delinquent as to that part of the taxes the owner is supposed to pay, and there is a liklihood that they will be offered for sale this year, now, under the circumstances, the Collector of Revenue for this county requests your opinion thru this office as to the sale, in this wise: Does the land advertise for the amount of current taxes shown to be due on his books or does he add that differential rebated by reason of the forest crop program."

The specific question you ask is, in case the County Collector proceeds to sell lands included in a forest cropland plan for delinquent taxes, "does the land advertise for the amount of current taxes shown to be due on his books or does he add that differential rebated by reason of the forest crop program". Said Chapter 254 provides for the creation of cropland districts and the classification of forest croplands by

the Conservation Commission of Missouri called in said chapter the "Commission". Said Chapter 254 in Section 254.080 thereof, provides that such classified forest croplands may receive partial relief from taxation during a period, or periods, of time not to exceed twenty-five years in any case.

The chapter further provides in Section 254.090 that, during the time any such lands are classified as forest croplands they shall be assessed for general taxation purposes at one dollar per acre and taxed at the local rates of the county wherein the lands are located.

Chapter 140, RSMo 1949, covers the subject of "Collection of Delinquent Taxes, Generally". Section 140.010 of said chapter defining delinquent real estate taxes, reads, in part, as follows:

> "All real estate upon which the taxes remain unpaid on the first day of January, annually, shall be deemed delinquent, and the said county collector shall proceed to enforce the lien of the state thereon, as required by this chapter, * * * ."

Section 140.020 also defines such delinquent taxes as "back taxes".

Section 140.030 of said chapter provides that when the Collector is unable to collect taxes specified on the tax book, after due effort to collect the same, he shall make two lists, one called the "'tangible personal property delinquent list,'", the other to be called the "'land delinquent list,'" in the latter of which "shall be stated the taxes on lands and town lots where taxes have not been collected, with a full description of said lands and lots, and the amount of taxes due thereon, set opposite each tract of land or town lot".

Section 140.050 requires the County Clerk to make a back tax book, after such lists have been filed in his office, and when completed such book shall be delivered to the Collector.

Section 140.060 provides that all tracts of land or city lots on which back taxes are due shall be listed in numerical order with the legal description thereof, the name of the owner if known, or if unknown in the name of the person to whom such land was last assessed, and to be set forth opposite each tract of land or town lot. The section further provides that in appropriate columns, shall be entered the year or years for which such land tax is delinquent, the amount of original tax due each fund, the interest due on such tax at the time of making the

back tax book, the clerk's fee and the aggregate amount of taxes, interest, and clerk's fees charged against such land for all the years delinquent, and the aggregate to bear interest at the rate of 10% per annum from the time of making such book until paid.

Section 140.010 provides a penalty of 10% of each year's delinquency shall be added to the amount of the delinquent tax, except that the penalty on lands redeemed prior to sale shall not exceed 1% per month or fractional part thereof or 10% annually.

Section 140.110, requiring the Collector to collect delinquent taxes on land and lots according to the taxes contained in such back tax book, reads, in part, as follows:

> "The collectors of the respective counties and the collectors of such cities, respectively, shall proceed to collect the taxes contained in such back tax book or recorded list of the delinquent land and lots in the collector's office as herein required, * * *".

Pursuant to the foregoing procedures, and requiring the sale by the County Collector of all lands and lots for delinquent real estate taxes contained in such back tax book, after due notice of such intended sale as provided in Section 140.170 of said chapter, Section 140.150 provides as follows:

> "1. All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided for in this chapter on the fourth Monday in August of each year.
>
> "2. No real property shall be sold for state, county or city taxes without judicial proceedings, unless the notice of sale shall contain the names of all record owners thereof, or the names of all owners appearing on the land tax book and all other information required by law; provided, however, delinquent taxes, with penalty, interest and costs, may be paid to the county collector at any time before the property is sold therefor.
>
> "3. The entry of record by the county collector listing the delinquent lands and lots

> as provided for in this chapter shall be and become a levy upon such delinquent lands and lots for the purpose of enforcing the lien of delinquent and unpaid taxes, together with penalty, interest and costs."

These provisions authorizing the sale of real estate for delinquent taxes have been referred to by the Courts as the "Jones-Munger Law". Such sections in our present Revision of 1949, providing for the Collector's proceedings for the sale of real estate for delinquent taxes, were numbered in the 1939 Revised Statutes as Section 11108, etc.

We have thus observed by such statutes that land or town lots may only be sold under Section 140.150, by the Collector for delinquent taxes or back taxes such as are included in the "Land Delinquent List" (Section 140.030) and which are extended in the "Back Tax Book" (Section 140.070).

Our Supreme Court in the case of Mahurin, et al. vs. Tucker, 161 S.W. (2d) 423, construed certain sections of the Jones-Munger Law of the Revision of 1939 with respect to the purpose and effect of said statutes as to requiring the sale of lands for delinquent taxes. The Court, l.c. 424, on that question, said:

> "The Jones-Munger law contemplates that the sale take into account all the then existing delinquent taxes. * * * ."
>
> (Citing Sections 11126, 11129, R.S.Mo. 1939).

Reverting again to Chapter 254, Section 254.180 thereof, provides for the creation of a "forest cropland fund" to consist of yield taxes named in said chapter, monies appropriated from general revenue funds of the State for such purposes, and monies available to the State from Federal funds for purposes of said chapter.

Section 254.110 further provides that the Commission, noted in said chapter, may determine as of January first of each year the number of acres of privately owned forest cropland which have been accepted in each county under said chapter, and may pay to each county in which such forest croplands are situated, a certain sum out of such fund as a grant <u>in lieu of taxes</u>. (Underscoring ours.)

Honorable Friend B. Greene:

We have observed from Section 140.010, supra, that theretofore unpaid taxes become delinquent on January first of each year. Section 254.110 of said Chapter 254 provides that the Commission shall determine as of January first of each year the number of acres of privately owned forest cropland which have been accepted in each county under the Forest Cropland Plan provided for in such chapter. This section further provides that the State may pay to each county in which such lands are situated, a certain sum out of the Cropland Fund provided for in Section 254.180 of such chapter as a grant in lieu of taxes, of .02¢ per acre per year for each acre so accepted. The section further provides that the Commission shall annually certify to the Director of Revenue and the State Auditor the amount payable to each county and which the Treasurer is directed to pay, after appropriations are made for such fund as provided for in said section, on or before the First day of January following.

Reading Section 140.010 and Section 254.110 together, it is clear, we believe, that if, under said Section 254.110, such payment and grant to any county having a Forest Cropland Plan is made before the First day of the following January, as partial relief, as provided in Section 254.080, from taxes, such taxes so relieved, would not, and could not, become delinquent under said Section 140.010. They would simply, to the extent of such relief, not exist, and hence, could not become delinquent. Keeping in mind the above-noted statutes which permit the sale of real estate only for delinquent taxes, and keeping in mind also the fact that under said Section 254.110 the sums paid out of the Forest Cropland Fund to the counties, as is provided in said section, before the First of the following January, it becomes further apparent that such taxes as are so paid to the counties by reason of a Forest Cropland Program may not be included in the aggregate of delinquent taxes upon which a sale of real estate within a Forest Cropland District may be effected by the County Collector, and that only the taxes shown to be due and delinquent on the Collector's back tax book shall be included in the notice advertising the sale and in carrying out such sale itself.

CONCLUSION.

It is, therefore, considering the premises, the opinion of this Department that the Collector of Revenue in a county having a Forest Cropland Plan in effect may not include in the notice of sale of land, nor in the sale itself, as delinquent

Honorable Friend B. Greene:

taxes the sums paid to any county from the Forest Cropland Fund as a grant during any year in lieu of taxes which might otherwise become delinquent the first of the following January, because such taxes would not, and could not become delinquent, but may only base such notice and sale on the taxes shown to be due and delinquent on the Collector's back tax book.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GWC:ir

CIVIL DEFENSE: Governor, by rule, may require loyalty oath

GOVERNOR: of civil defense employees.

OFFICERS:

FILED
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1-23-52

January 23, 1952

Honorable Ralph W. Hammond
Civil Defense Agency
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

> "The Congress has appropriated grant-in-aid funds to the states for use in certain categories of the civil defense program. These funds are administered by the Federal Civil Defense Administration under Public Law 920, Eighty-first Congress. Whereas the State of Missouri at the present time does not have funds for matching these grant-in-aid monies, certain of the various political sub-divisions are interested in securing this aid and have funds for such purpose. The Federal Civil Defense Administration, however, will deal only with the states in this matter, and the administrator has established regulations concerning the allocations of these funds.
>
> "Among these regulations is a provision requiring an oath to be taken by all persons serving as members of a civil defense organization. Specifically, FCDA Regulations, Section 1705.3 is quoted in part as follows:
>
> > '1705.3 Conditions of Contributions. The Administrator will make contributions to the States, on the basis of programs or projects approved by him, for the purchase of materials, equipment, and facilities for training and education subject to the following conditions: **
> >
> > (n) Loyalty Oath. No request for financial assistance for training and education shall be approved by the Administrator unless (1)

the State law requires that each person, other than a Federal employee, who is appointed to serve in a State or local organization for civil defense shall take an oath in writing before a person authorized to administer oaths, which oath shall be substantially as follows:

"I _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same, that I take this obligation freely without any mental reservation or purpose of evasion and that I will well and faithfully discharge the duties upon which I am about to enter.

"And I do further swear (or affirm) that I do not advocate, nor am I a member or an affiliate of any organization, group, or combination of persons that advocates the overthrow of the Government of the United States by force or violence; and that during such time as I am a member of the (name of civil defense organization), I will not advocate nor become a member or an affiliate of any organization, group, or combination of persons that advocates the overthrow of the Government of the United States by force or violence."

or (2) the State certifies that it has directed the State civil defense agency to require that each person, other than a Federal employee, who is appointed to serve in a State or local organization for civil defense, shall, before entering upon his duties, take such an oath in writing before a person authorized to administer oaths.'

"In view of the requirements of FCDA regulations, an opinion is requested as to whether the Governor has the authority to require on behalf of the state that all persons serving in a state or local organization for civil defense shall be required to take such an oath."

Senate Committee Substitute for Senate Bill No. 66, passed by the 66th General Assembly, and known as the Civil Defense Act, provides in Section 26.180 as follows:

> "1. The Governor shall have general direction and control of the Civil Defense Agency, and shall be responsible for the carrying out of the provisions of this act. In performing his duties under this act, the Governor is authorized to cooperate with the federal government, with other states, and with private agencies in all matters pertaining to civil defense.
>
> "2. Prior to an emergency as defined in this law, the Governor shall have the following powers:
>
> > (1) To make, amend, and rescind the necessary orders, rules and regulations to carry out the provisions of this act within the limits of the authority conferred upon him herein, with due consideration of the plans of the Federal Government;
> >
> > (2) To prepare a comprehensive plan and program for the civil defense of this state, such plan and program to be integrated into and coordinated with the civil defense plans of the Federal Government and of other states to the fullest possible extent, and to coordinate the preparation of plans and programs for civil defense by the political subdivisions of this state, such plans to be integrated into and coordinated with the civil defense plan and program of this state to the fullest possible extent."

It is well settled in this state that when the right to make rules and regulations is granted by the General Assembly such power must be exercised in such a way that the rule does not nullify the expressed will of the Legislature. State ex rel. Springfield Warehouse & Transfer Co. v. Public Service Commission, 225 S.W. (2d) 792. Further, the rule must be reasonable. King v. Priest, 206 S.W. (2d) 547.

The constitutionality of a requirement that public employees must take a loyalty oath was before the Supreme Court of the United States in Garner v. Board of Pub. Wks. of Los Angeles,

341 U.S. 716, 71 S. Ct. 909, 95 L. Ed. 1317. The court upheld the constitutionality of an ordinance of the City of Los Angeles which required every person who held an office or position in the service of the city to take an oath similar to the one required by the rules and regulations of the Federal Civil Defense Administration. The court, through Mr. Justice Clark, said:

> " * * * The provisions operating thus prospectively were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States. Cf Gerende v. Board of Supervisors of Elections, 341 US 56, ante, 745, 71 S Ct 565 (1951). Likewise, as a regulation of political activity of municipal employees, the amendment was reasonably designed to protect the integrity and competency of the service. This Court has held that Congress may reasonably restrict the political activity of federal civil service employees for such a purpose, United Public Workers v. Mitchell, 330 US 75, 102, 103, 91 L ed 754, 774, 775, 67 S Ct 556 (1947), and a State is not without power to do as much.
>
> "The Charter amendment defined standards of eligibility for employees and specifically denied city employment to those persons who thereafter should not comply with these standards. While the amendment deprived no one of employment with or without trial, yet from its effective date it terminated any privilege to work for the city in the case of persons who thereafter engaged in the activity proscribed."

While the above case involved ordinances which required the loyalty oath, still the same conclusion was arrived at in the cases of Steiner v. Darby, 88 Cal. App. (2d) 481, 199 P. (2d) 429, and Hirschman v. Los Angeles County, 231 P. (2d) 140, which dealt with a resolution of the Board of Supervisors of Los Angeles County. In the Steiner case the court said:

> " * * * Certainly it is clear that a private employer would be perfectly justified in requiring an employee to submit to questioning and examination before leaving his place of employment in order to ascertain whether the

> employee was stealing property of the employer, and he might obviously question his employee as to whether he intended to take or destroy the employer's property. A servant employed by the People is held to an even higher standard, and his employer, the People, not only may, but it is their duty through their authorized representatives to make proper inquiry as to his fitness for the position which he occupies and as to his intentions and acts relative to his loyalty to the People."

In the Hirschman case Presiding Justice Moore said:

> "The principle involved is not whether a constitutional guaranty has been violated but rather is it the right of the state or an arm of its government to prescribe moral and ethical as well as educational standards of those engaged in public service. Not only must an employee devote the prescribed hours to his work and apply thereto the necessary intelligence, but he is obliged to refrain from such deception as contracting an interest inconsistent with his duties and to this end he is subject to regulation. * * * It would be not only monstrously oppressive to require a county to retain an employee who has adopted an attitude hostile to the state, * * * but it would undermine authority and induce the employee of treasonable persuasion to bite the hand that feeds him. * * *"

The Supreme Court of Oklahoma, in the case of Board of Regents v. Updegraff, 237 P. (2d) 131, decided October 18, 1951, and rehearing denied November 6, 1951, held that the statutory requirement of a loyalty oath for teachers, professors and other employees of the Oklahoma Agricultural College was proper and constitutional.

In view of the above authorities it will be seen that the Governor, under the authority granted him by Senate Committee Substitute for Senate Bill No. 66, to make rules and regulations in order to carry out the Civil Defense Act with due consideration of the plans of the Federal government, may make a rule and regulation requiring all persons serving in state or local organizations for civil defense to take a loyalty oath.

Honorable Ralph W. Hammond

CONCLUSION

It is therefore the opinion of this department that the Governor may, by rule and regulation, require all persons serving in state and local organizations for civil defense to take a "loyalty" oath.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

J.E.T.

J. E. TAYLOR
Attorney General

AMO'K:ml

DIVISION OF HEALTH, Power to Fix and Increase Fees for Services:

The Division of Health may increase fees for services rendered by the Department for maintenance of a safe quality of water dispensed to the public, provided, such increase is necessary to cover the costs of such services.

FILED
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February 8, 1952

2-8-52

Buford G. Hamilton, M. D.
Director, Division of Health
Jefferson City, Missouri

Dear Dr. Hamilton:

This is in reply to your request for an opinion of this department concerning the amendment of present regulations governing public water supplies, which request is as follows:

> "Section 192.180 of the Revised Statutes of Missouri, 1949, provides that the Division of Health shall make rules and regulations for the collection of samples and analysis of water either natural or treated, furnished by municipalities, corporations, companies, or individuals to the public and shall fix the fees for any services rendered under the rules and regulations to cover the cost of the service. At the present time, this Division receives approximately $12,000 per year in such laboratory fees. An analysis of our actual current cost of such laboratory service indicates that the cost is approximately $20,000 per year. We are, therefore, considering a revision of our schedule of fees for the required sanitary analysis.
>
> "Items (d) 3 and (d) 4 of Section 10 of the enclosed regulations governing the

installation, extension, and operation of public water supplies set out the schedule of fees now in effect. It is proposed to file with the Secretary of State revised items (d) 3 and (d) 4 of Section 10 reading as follows:

"'3. Ground Water Supplies. The fee for the required sanitary analysis of public water supplies of ground origin which do not require purification shall be as follows:

"Population of Cities:

Under 1,500	$25.00 per year
1,500 - 3,000	35.00 per year
3,000 - 6,000	45.00 per year
6,000 - 10,000	50.00 per year
10,000 and above	55.00 per year

"'4. Surface Water Supplies. The fee for the required sanitary analysis of public water supplies of surface origin and ground water supplies which require purification shall be as follows:

"Population of Cities:

Under 1,500	$ 75.00 per year
1,500 - 3,000	110.00 per year
3,000 - 6,000	145.00 per year
6,000 - 10,000	165.00 per year
10,000 and above	185.00 per year

"It is requested that we be advised as to our authority to file the above proposed amendment to our existing regulations governing the installation, extension, and operation of public water supplies."

Section 192.180, RSMo 1949, is as follows:

"The division of health shall make and enforce adequate rules and regulations for the maintenance of a

> safe quality of water dispensed to the public and for the collection of samples and analysis of water, either natural or treated, furnished by municipalities, corporations, companies, or individuals to the public and shall fix the fees for any service rendered under the rules and regulations to cover the cost of the service."

This section gives the Division of Health power to make rules and regulations for the maintenance of a safe quality of water dispensed to the public. Also, the power to fix fees for services rendered by the Division of Health to cover the reasonable cost of such services.

The Division of Health by authority of said Section 192.180 has power among other things to fix fees for services rendered under the rules and regulations to cover the cost of such service. These fees must, however, be reasonable and should not be greatly in excess, if any, of the cost of the service rendered.

The power to make rules and regulations includes the power to alter them and to determine any reasonable policy of interpretation and application of said rules. In State ex rel. Dail v. Public Service Commission et al., 203 S.W. (2d) 491, l.c. 497, the court said:

> "The rule-making power of the Commission is not questioned. The power to make rules includes the power to alter them, and to determine any reasonable policy of interpretation and application of said rules. By the terms of the new Administrative Review Act heretofore referred to a rule is defined as including every regulations, standard, or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, adopted by any agency."

Buford G. Hamilton, M.D.

Under this statute the Division of Health has power to make regulations and fix prices of service, and having such power the courts hold it also has the power to alter them to meet new conditions so long as such new regulations and new prices are reasonable.

It is the duty of your department to fix reasonable prices for services rendered under the rules and regulations. We are in no position to determine as to whether or not the prices set out in your request are reasonable or unreasonable because all the facts pertaining thereto are wholly within the knowledge of your department.

By virtue of the above statute and decision, we are of the opinion you have authority to alter or amend regulations and fix higher prices, if necessary, for services rendered under the rules and regulations to cover the cost of such service, provided such additional fees are reasonable under all the facts and circumstances. The total fees collected under the proposed change should not be greatly in excess, if any, of the reasonable cost of service to be rendered.

CONCLUSION

The Division of Health has power to fix the fees for services rendered for the maintenance of a safe quality of water dispensed to the public and may increase such fees, if necessary, so as to cover the cost of service contemplated under the provisions of Section 192.180, RSMo 1949.

Respectfully submitted,

GROVER C. HUSTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GCH/fwh

CIVIL DEFENSE: Civil defense monies received from Federal government and political subdivisions not state monies so as to be placed in state treasury and appropriated.

February 14, 1952

FILED
37

Honorable Ralph W. Hammond
Office of Civil Defense
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion upon the following questions:

> "1. Will funds contributed to the civil defense program for matching purposes by the Federal government and by political sub-divisions of this state be considered state funds under the purview of Article III, Section 36 of the Missouri Constitution?
>
> "2. Under the provisions of Section 26.200 Missouri Civil Defense Act (Senate Committee Substitute for Senate Bill #66, Sixty-sixth General Assembly) is the Governor empowered to receive and disburse such funds for the participation of such political sub-divisions in the Federal grant-in-aid program? Specifically, can he receive and transmit funds both from the Federal government and from the political sub-divisions, municipal corporations and their instrumentalities of the State of Missouri?"

At the outset, it is necessary to point out the procedure laid down by the Federal Civil Defense Act of 1950 (64 Stat. 1245, 50 U.S.C.A. App. 2251, 2297), and the Missouri Civil Defense Act (S.C.S.S.B. 66, 66th General Assembly, V.A.M.S., Sections 26.140 to 26.270), in relation to contributions and matching of funds by the Federal government and political subdivisions of the state. Section 2281(i) of the Federal act provides that the Federal Civil Defense Administrator is

authorized to "make financial contributions * * * to the States for civil defense purposes." The section further provides that "the amounts authorized to be contributed by the Administrator to each State * * * shall be equally matched by such State from any source it determines is consistent with its laws." Section 26.210 of the Missouri act provides that political subdivisions of this state may "appropriate and expend funds * * * for civil defense purposes." The section further provides that subdivisions may "direct and coordinate the development of civil defense plans and programs in accordance with the policies and plans of the federal and state civil defense agencies."

Section 26.200, RSMo 1949, provides as follows:

> "Whenever the federal government or officer or agency thereof shall offer to the state, or through the state to any political subdivision thereof, services, equipment, supplies, materials or funds by way of gift, grant or loan, for the purpose of civil defense, the state acting through the governor, or the political subdivision, acting with the consent of the governor and through its executive officer, may accept such offer and upon acceptance the governor or executive officer of the political subdivision may authorize any officer of the state or of the political subdivision, as the case may be, to receive such services, equipment, supplies, materials or funds on behalf of the state or the political subdivision subject to the terms of the offer."

Section 36 of Article III of the Constitution of Missouri, 1945, provides, in part, as follows:

> "All revenue collected and money received by the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury, except in pursuance of appropriations made by law. * * *"

There is another section of the Constitution which deals with state funds, the same being Section 15 of Article IV, which reads as follows:

> "The state treasurer shall be custodian of all state funds. All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. * * *"

The question as presented by your request is whether monies received by the state from the Federal government for civil defense purposes, which monies are contributions from the Federal government to political subdivisions of this state, are state funds so that they must go into the state treasury and be appropriated out by law. There is the additional question of whether monies contributed by the political subdivisions to the Federal government, through the state, are state funds within the meaning of the two constitutional provisions quoted above. In this connection we wish to point out that this department, in an opinion to Honorable Carl J. Henry, Chairman of the Unemployment Compensation Commission, dated July 2, 1946, held that monies paid by employers under the State Unemployment Insurance law, which were collected and placed in a separate fund and paid directly over to the United States Treasury, were not state funds within the meaning of the Constitution and did not have to be appropriated by law.

This department has further held, in an opinion to Mrs. George A. Rozier, President of the Library Advisory Board, dated February 9, 1949, that money received from the Carnegie Corporation of New York by the Missouri State Library for the purchase of films was received by the State Library as trustees, and that such money did not become state monies within the meaning of Section 36 of Article III of the Constitution of Missouri, 1945.

Our courts have had occasion to interpret these provisions and to determine what constitutes state funds and what does not constitute state funds within the meaning of the Constitution. In the early case of State ex rel. Stevenson v. Stephens, 136 Mo. 537, 37 S.W. 506, the court had before it the status of securities deposited with the State Treasurer by a bond investment company for the protection of the investors in the bonds of the company. At Mo. l.c. 546 the court said:

> "It is next insisted that though respondent may hold the money as treasurer, and for the purpose of making the security good, still he can only be required to pay it out in the manner and under the restrictions of the constitution and laws of the state."

The court then quoted the two constitutional provisions, and continued:

> "It is manifest that these provisions only apply to money 'belonging to the state.' The money in question, though it was deposited with the treasurer, was for the specific purpose of making good the security intended for the protection of those dealing with bond investment companies, and was not money belonging to the state within the meaning of the constitution. The securities, whether in money, bonds, or notes, are held by the treasurer in trust, not for the use or benefit of the state, but for the protection of those who may hold the bonds, certificates or debentures of bond investment companies which are authorized to sell such securities on the partial payment or installment plan."

In conclusion it was said:

> " * * * It is clear that the legislature did not intend that the money or securities deposited should be paid out or returned under the regulation required in paying out the public money. We are of the opinion, therefore, that respondent had the implied power, under the act, to make the agreement and that an appropriation or warrant of the auditor was not necessary."

In the case of State ex rel. Thompson v. Board of Regents, 305 Mo. 57, 264 S.W. 698, it appears that the Board of Regents of the Northeast Missouri State Teachers College had purchased insurance policies upon buildings belonging to the college and had paid for said policies out of funds not appropriated by the Legislature for the support of said college. A loss had occurred under said policies, and the Board of Regents had collected

damages from the insurance company, and the State Treasurer was seeking to compel the Board of Regents to pay the proceeds of said policies into the state treasury. The court said:

> " * * * By revenue, whether its meaning be measured by the general or the legal lexicographer, is meant the current income of the state from whatsoever source derived which is subject to appropriation for public uses. This current income may be derived from various sources, as our numerous statutes attest, but, no matter from what source derived, if required to be paid into the treasury, it becomes revenue or state money; its classification as such being dependent upon specific legislative enactment, or, as aptly put by the respondent, state money means money the state, in its sovereign capacity, is authorized to receive, the source of its authority being the Legislature. * * *"

With the above rules in mind, it will be seen that, under Section 26.200, RSMo 1949, when the Federal government shall offer "through the state to any political subdivision thereof, services, equipment, supplies, materials or funds by way of gift, grant or loan, for the purpose of civil defense," then the state, acting through the Governor, may accept such offer and the Governor may authorize any officer of the political subdivision to receive such contribution. We believe it is apparent it was not intended by the Legislature that these contributions to the political subdivisions should be state funds, but the Governor is only the intermediary through whom the funds are directed and sent. The same is true upon funds received from the political subdivisions, which funds are to be transmitted to the Federal government for the purpose of matching federal funds and the whole to be used for civil defense purposes.

This opinion has been written upon the assumption that the funds received from the Federal government for use by the political subdivisions are as stated in Section 26.200, supra, offered "through the state to any political subdivision." If, however, the Federal government, under the provisions of Section 2281(i) of the Federal Civil Defense Act of 1950, makes the financial contributions to the state absolute and title is

intended to be in the state and not in the political subdivision, then it would appear that such monies are state funds and must go into the state treasury to be appropriated out by law.

CONCLUSION

It is therefore the opinion of this department that funds contributed to the civil defense program for matching purposes by the Federal government and political subdivisions of this state are not necessarily state funds within the meaning of Section 36, Article III, and Section 15, Article IV, Constitution of Missouri, and that such funds do not have to go into the state treasury and do not have to be appropriated out by law.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CRIMINAL LAW:
MOTOR VEHICLE:

Owner subject to penalty of misdemeanor for operating motor vehicle not properly licensed where driven by an agent or employee.

February 20, 1952

FILED
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3-7-52

Honorable David E. Harrison
Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this department which request reads as follows:

> "It frequently comes to the attention of the department that a motor vehicle owner may fail to renew the motor vehicle license when it is due, but that the vehicle may be operated by an individual in the employ of the owner. It has been our policy in the past to arrest the driver of the vehicle, although he is not directly responsible for the failure to renew the license at the proper time.
>
> "One of the prosecuting attorneys of our counties located in the southwest requested that we obtain from your office an opinion as to whether or not there is any section of the motor vehicle statutes under which the owner of the vehicle might be filed upon for failure to re-register."

Subsection 5 of Section 301.130, RSMo 1949, provides in part as follows:

> "Before being operated on any highway of this state every motor vehicle or

> trailer shall have displayed the permanent license plates or temporary permit issued by the director of revenue entirely unobscured, unobstructed, all parts thereof plainly visible and kept reasonably clean, and so fastened as not to swing. * * *"

Section 301.440, RSMo 1949, provides as follows:

> "Any person who violates any provision of this chapter for which no specific punishment is provided, shall upon conviction thereof be punished by a fine of not less than five dollars or more than five hundred dollars or by imprisonment in the county jail for a term not exceeding two years, or by both such fine and imprisonment."

Since no specific punishment has been provided for violation of Subsection 5 of Section 301.130, the provisions of Section 301.440 would be applicable where a motor vehicle is operated on the highways of this state without displaying the permanent license plates or temporary permit issued by the director of revenue.

Although under the facts you have presented, an agent or employee is actually operating the motor vehicle, we are of the opinion that the owner as employer is likewise subject to the provisions of Section 301.440, are liable for the unlawful act of his agent or employee. It is generally stated that a principal or master is not liable for the criminal acts of his agent or servant since the requisite intent cannot be imputed to the principal or master; however, the rule is otherwise where an act is absolutely forbidden and the intent is not a necessary element of the crime. The latter rule is stated in 22 C.J.S., Criminal Law, Section 84, as follows:

> "Moreover, under statutes positively forbidding certain acts irrespective of the motive or intent of the actor, a principal or master may be criminally liable for his agent's or employer's act done within the scope of his employment, * * *."

The rule is stated in Wharton's Criminal Law, 12 Ed. Section 286, page 374, thusly:

> "When the agent performs the illegal act under an absent principal's direction, whether express or implied, this imposes responsibility on the principal. In misdemeanors the act may be charged to have been done by the principal himself, without reference to an agent."

In the case of Richardson v. United States, 104 C.C.A., 69, the court in passing upon a similar question said:

> "Where an act is done by the procurement of a person it is his act in effect, even where it is made a crime. It is true that, in case of a felony, in order to be answerable as principal, the person must have been actually or constructively present where another, equally guilty, commits the deed. But the offense here is a misdemeanor, in which all parties are principals, and there is no occasion therefore to refine the distinction between aiders and abetors, or principals in the first or second degree."

We must assume from the request as stated that the person actually operated the motor vehicle is acting at the request of the owner and within the scope of his employment. If such be the case, we are of the opinion that under the foregoing cited cases and authorities, that the owner of the motor vehicle may be charged under the provisions of Section 301.130 and 301.440, RSMo 1949, for operating on the highways of this state, a motor vehicle not properly licensed. The owner could not himself actually operate the vehicle nor could he employ an agent to operate it for him and escape the penalty of law.

CONCLUSION

Therefore, it is the opinion of this department that the owner of a motor vehicle not properly licensed and operated by an agent or employee at the direction or request of the owner, is subject

Honorable David E. Harrison

to the provisions of Section 301.440, RSMo 1949, and liable as a principal for violating Section 301.130, RSMo 1949.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
ATTORNEY GENERAL

DDG:hr

COUNTY COURTS:
APPROPRIATIONS:

The county court in any county may in any one year, appropriate out of the county treasury, a sum of money not exceeding $300, for the benefit of any society in its county regularly organized as a county agricultural and mechanical society, county fair, county corn growers' association, county poultry association, county stock growers' association, or any other organization or incorporated society having for its object the holding of county fairs or the advancement of agriculture or its allied industries, and that such appropriation is not limited to any one such society but that the county court may make such an appropriation to as many such societies as it deems expedient.

FILED
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August 22, 1952

Honorable Lane Harlan
Prosecuting Attorney
Cooper County
Boonville, Missouri

8-26-52

Dear Sir:

Your recent letter to the Attorney General requesting an official opinion has been assigned to me to answer.

You thus state your opinion request:

> "Our County Court of Cooper County, a third class county, is desirous of an opinion from your office regarding the first sentence of the above section. (Section 262.350)
>
> "Cooper County has several agricultural societies or fairs and the question is whether or not the County Court is limited to a total of three hundred dollars ($300) for all of such societies or fairs or whether the Court can appropriate a sum of three hundred dollars ($300) for each (or any number it so desires) of the societies or fairs."

Section 262.350, RSMo 1949, to which you refer, states in part as follows:

> "The county court of any county may, if it be deemed expedient, appropriate out of the county treasury for the benefit of

> any society regularly organized as a county agricultural and mechanical society, county fair, county corn growers' association, county poultry association, county stock growers' association or any other organization or incorporated society having for its object the holding of county fairs or the advancement of agriculture or its allied industries, a sum not exceeding three hundred dollars in any one year. ***"

This portion of the above section is to be found in the Revised Statutes of Missouri, 1929, Section 12490. It was originally enacted in the Statutes of Missouri, 1919, wherein it is Section 12059. Its meaning has never at any time been construed by the Appellate Courts of this state.

Our problem here is to determine whether, when Section 262.350, supra, uses the words "any society," it means one society out of a number which are enumerated, or whether it means "all" or "every." That is, whether a county court may, under the authority of the above section, appropriate a sum of money not exceeding $300 in any one year to any one, but not to more than one, of the organizations listed in the section; or whether it may appropriate up to $300 for more than one such organization.

There are a great many cases which construe the meaning of the word "any." Some of these cases hold that the word "any" means one. In the case of Martin v. Martin, 35 N.E. (2d), 560, the Court stated that any means "one, indefinitely; one of three or more." However, it appears that the great majority of cases construe it to mean "all" or "every." In the Missouri case of Wormington vs. City of Monett, 204 S.W. (2d) 264, the Court stated, l.c. 266, 267:

> "The point in issue here must be determined under Section 22 of the Civil Code, Laws Mo. 1943, page 364, Mo. R.S.A. § 847.22, and our Supreme Court Rule 3.08. The pertinent Code provisions of Section 22 are:
>
> "'(a) (1) If a party dies and the claim is not thereby extinguished, the court shall on motion order substitution of the proper parties. The motion for substitution may be made by the successors or representatives

> of the deceased party or by any party and, together with the notice of the hearing, shall be served on the parties as provided in section 5, and upon persons not parties in the manner provided for the service of a summons. (Emphasis ours.) * * *'"

It is therefore our opinion that when Section 262.350, supra, uses the words "any society," it means that the county court is not restricted to an appropriation to some one of the societies enumerated, but that it may make an appropriation up to $300 to as many such societies as it deems expedient.

CONCLUSION

It is the opinion of this department that the county court of any county may in any one year, appropriate out of the county treasury, a sum of money not exceeding $300, for the benefit of any society in its county regularly organized as a county agricultural and mechanical society, county fair, county corn growers' association, county poultry association, county stock growers' association, or any other organization or incorporated society having for its object the holding of county fairs or the advancement of agriculture or its allied industries, and that such appropriation is not limited to any one such society but that the county court may make such an appropriation to as many such societies as it deems expedient.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

HPWab

APPROVED:

J. E. TAYLOR
Attorney General

TAXATION:
DELINQUENT PERSONAL TAXES:

Collector shall collect on delinquent personal property taxes an amount not to exceed 1% per month or 10% per annum and 2% of the amount of the tax.

FILED
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December 16, 1952

12-17-52

Honorable Morran D. Harris
Prosecuting Attorney of
St. Clair County
Osceola, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads in part as follows:

"In our county (St. Clair-4th class), the Collector has been collecting 1% per cent interest per month (not to exceed 10% per year) on all delinquent personal taxes, together with a 2% penalty. This is the case when the personal tax is delinquent, but is collected without suit (a true copy of one such collection is enclosed for your examination). Furthermore, this is being done under directive from the Audit Department, which Department has refused to allow the Collector, or the County Court (by Court Order) to compromise interest and penalties in the collection of said taxes.

* * * * * * * * * * * * *

"Would you tell me what amount of interest and penalty the collector is entitled to collect on delinquent personal taxes when no suit has been filed and what authority he has for collecting same. Also, can the County Court, by Court Order, compromise said interest and penalty (not the tax itself) in part or whole? * * *"

Honorable Morran D. Harris

You first inquire as to what amount a county collector is entitled to collect in addition to a delinquent personal tax. In this regard we refer you to Section 139.100, RSMo 1949, which provides that on delinquent taxes the collector shall collect and account for, as other taxes, an additional tax, as penalty, the amount provided for in Section 140.100. Said section reads as follows:

> "1. If any taxpayer shall fail or neglect to pay such collector his taxes at the time and place required by such notices, then it shall be the duty of the collector after the first day of January then next ensuing, to collect and account for, as other taxes, an additional tax, as penalty, the amount provided for in section 140.100.
>
> "2. Collectors shall, on the day of their annual settlement with the county court, file with said court a statement, under oath, of the amount so received, and from whom received, and settle with the court therefor; provided, however, that said interest shall not be chargeable against persons who are absent from their homes, and engaged in the military service of this state or of the United States; provided, that the provisions of this section shall apply to the city of St. Louis, so far as the same relates to addition of said interest, which, in said city, shall be collected and accounted for by the collector as other taxes, for which he shall receive no compensation.
>
> "3. Whenever any collector of the revenue in the state fails or refuses to collect the penalty provided for in this section on state and county taxes, it shall be the duty of the director of revenue and county clerk to charge such collectors with the amount of interest due thereon, as shown by the returns of the county clerk, and such collector shall be liable to the penalties as provided for in section 139.270."

The amount specified in Section 140.100 is 1% per month or fractional part thereof not to exceed 10% per annum. Said section reads in part as follows:

Honorable Morran D. Harris

> "1. Each tract of land in the back tax book, in addition to the amount of tax delinquent, shall be charged with a penalty of ten per cent of each year's delinquency except that the penalty on lands redeemed prior to sale shall not exceed one per cent per month or fractional part thereof or ten per cent annually."

Section 52.290 provides that the collector shall be allowed to collect 2% of the amount of the delinquent tax for services rendered in the collection of the delinquent taxes.

From the preceding referred to provisions, we are of the opinion that a county collector in counties of the fourth class is entitled to collect, in addition to the delinquent tax, an amount not to exceed 1% per month or 10% per annum and 2% of the amount collected as provided in Section 52.290.

In answer to your inquiry as to whether or not the county court by court order may compromise said interest and penalty, I am enclosing a copy of an opinion to the Honorable Rex H. Henson, Prosecuting Attorney of Butler County, May 28, 1952, holding that the interest and penalties of a delinquent personal property tax bill may be compromised by the county collector.

CONCLUSION

Therefore, it is the opinion of this office that in collecting delinquent personal property taxes, a collector of a county of the fourth class is authorized and has the duty of collecting, in addition to the amount of the tax bill, 1% per month not to exceed 10% per annum and 2% of the amount actually collected.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DDG:hr

THE INDUSTRIAL COMMISSION OF MISSOURI: Powers of the Commission, the separate members thereof, and of Referees.

: The Industrial Commission of Missouri, a member or a Referee may approve settlements any time, including a case on appeal, and may make a temporary or final award and perform any other act concerning awards except to review awards, the full Commission only having the right to review awards. The Division does not have exclusive authority to make awards. Rules A and B giving the Division such exclusive power, and depriving the Commission and its separate members of the power to hold hearings, make awards or approve compromise settlements are invalid.



January 21, 1952

1-28-52

Honorable Carl J. Henry
Chairman
Industrial Commission of Missouri
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Dear Chairman Henry:

This will be in response to your letter requesting this Department to construe the provisions and meaning of numerous sections in Chapters 286 and 287, RSMo 1949, relating to the powers of the Industrial Commission, the powers of the individuals members of the Commission and the powers of Referees respecting the enforcement of certain provisions of the Workmen's Compensation Act of Missouri. Your letter reads as follows:

> "We request a legal opinion on the following questions:
>
> "1. Is a Compromise Settlement of a Workmen's Compensation claim under Section 287.390, R.S. Mo. 49 valid when approved by only one member of the Industrial Commission, when the case is pending before the Commission? Can such a settlement be approved by the Commission, or one member, when the case is pending in court on appeal?
>
> "2. Is a Temporary or Final Award, or any other decision or order in Workmen's Compensation cases pending before the Industrial Commission, valid when made by only one member of the Commission?

> "In this connection we cite you to Section 286.010 for creation of the Industrial Commission; to Section 287.560 for powers of the Commission; to Section 287.020 (8) for definition of terms.
>
> "Under Section 287.410 the Industrial Commission may delegate powers to the Division of Workmen's Compensation. Under authority of this section Rules A and B on attached sheet were adopted and filed with the Secretary of State. Also see Section 287.610.
>
> "Question: When a settlement of a case pending before the Division of Workmen's Compensation (not appealed to the Commission) is made, can the Industrial Commission, or one member, approve the same, or does the Division alone have such authority?"

We shall here consider and determine the first question contained in paragraph 1 of your letter, whether a compromise settlement effected between the parties to a claim under Section 287.390 is valid when approved by only one member of the Commission when a case is pending before the Commission. Section 287.390, RSMo 1949 was in the Revision of our statutes 1929, as Section 3333. The section in R.S. Mo. 1939 was Section 3723. Section 287.390 provides that voluntary agreements in settlement of a claim between the parties to a claim may be made, and that nothing contained in Chapter 287 shall be construed as preventing such settlements. This section reads as follows:

> "Nothing in this chapter shall be construed as preventing the parties to claims hereunder from entering into voluntary agreements in settlement thereof, but no agreement by an employee or his dependents to waive his rights under this chapter shall be

> valid, nor shall any agreement of settlement or compromise of any dispute or claim for compensation under this chapter be valid until approved by the Commission, nor shall the commission approve any settlement which is not in accordance with the rights of the parties as given in this chapter. No such agreement shall be valid unless made after seven days from the date of the injury or death."

The section states that no compromise settlement agreement shall be valid until approved by the Commission. This section does not in terms provide that one member of the Commission alone may approve such settlements. Section 3333, R.S. Mo. 1929, and many other sections of that Revision of our statutes relating to the authority of one member of the Workmen's Compensation Commission to approve settlements and to perform other acts and duties incident to the enforcement of the Compensation Act were considered and construed by the Kansas City Court of Appeals in the case of Morgan vs. Jewell Const. Co., et al., 91 S.W. (2d) 638. That Court in a well-considered and comprehensive opinion held, construing the whole Act on the powers of members, that a single member of the Commission may approve a compromise settlement. That opinion decides also other questions submitted in your letter. We shall discuss and quote excerpts from the opinion on such other questions and this particular question as we proceed in this opinion, but we pause here to quote the holding of the Court on the question of approving settlements where, l.c. 641, the Court said:

> "* * * Under all of the circumstances, we think that a proper construction of the act requires a holding that a single member of the commission may approve a settlement of the kind in question * * *."

The Court stressed the fact that, while Section 3333, R.S. Mo. 1929, apparently imposed the duty of approving contracts of settlement upon the Commission as a body, other sections of the Act referred to single members of the Commission as having such authority, and that since such other sections were retained in the chapter giving such authority to

individual members of the Commission, this must be taken, the Court said, as the construction by the Legislature of its intention for individual members of the Commission to retain such powers, and that such construction by the Legislature of its own acts must be given due weight by the Courts. On this question the Court, l.c. 641, said:

> "It is well established that a construction of a statute by the Legislature, as indicated by the language of other or subsequent enactments, is entitled to consideration as an aid to interpreting a statute. 59 C.J. p. 1033; State ex rel. v. Hackman, 275 Mo. 47, 54, 204 S.W. 513; State ex inf. v. Long-Bell Lumber Co., 321 Mo. 461, 12 S.W. (2d) 64; Evans v. McLalin, 189 Mo. App. 310, 175 S.W. 294; State ex rel. v. Wilson, supra; Crohn v. Kansas City Home Telephone Co., 131 Mo. App. 313, 109 S.W. 1068. And where the controversy has arisen since the enactment of the subsequent statute or amendment wherein the Legislature had indicated that the statute should be taken to mean a certain thing, such legislative construction should be given great weight. * * * ."

A careful comparison of the sections construed by the Kansas City Court of Appeals in the Morgan case as constituting authority for a single member of the Commission to approve compromise settlements reveals that all of them are retained in our present Revision of 1949.

The Supreme Court of this State in the case of Liberty Mutual Insurance Company vs. Jones, 130 S.W. (2d) 945, gave its expression of the general belief that individual members did have various powers concurrent with those of the whole Commission where, l.c. 959, the Court said:

> "In the event of an accidental injury the parties to a claim may enter into a voluntary agreement in settlement thereof on forms prepared and supplied by the Commission. The informal conferences mentioned above are between

> the parties and some member, referee or legal advisor or the Commission; and are held to encourage such voluntary settlements. * * * ."

The Morgan case, supra, as decided by the Kansas City Court of Appeals has never been overruled or questioned. It is the law in this State on the issues and the principles there decided. The construction given the there named sections of the Compensation Act by the Court in the Morgan case to the effect that individual members of the Commission may approve settlements was well known and understood by the Legislature and such sections have remained undisturbed, and the construction of that Court of such statutes on the subject has remained unchanged for a period of more than sixteen years. The Court of Appeals of this State was, and is in that case the Court of last resort on the issues decided, and its judgment on the question here being considered was and is final, as the Act now stands.

59 C.J., pages 1061, 1062 and 1063, on the effect of construction of a statute by a Court of last resort, states the following applicable text:

> "Where a statute that has been construed by the courts of last resort has been reenacted in same, or substantially the same, terms, the legislature is presumed to have been familiar with its construction, and to have adopted it as a part of the law, unless a contrary intent clearly appears, or a different construction is expressly provided for; and the same rule applies in the construction of a statute enacted after a similar or cognate statute has been judicially construed. * * * ."

It would clearly appear, we believe, considering the above authorities, and in further consideration of the facts, since none of said sections of the Compensation Act so construed have been repealed, and since they have had both legislative and judicial sanction for many years it is compelling that they should be and they are here construed to give the separate members of the Commission the authority to approve compromise settlements of claims for

compensation when such claims are pending before the Commission and that such settlements, when so approved, are valid.

In the first paragraph of your letter you submit a second question, to-wit: "Can such a settlement be approved by the Commission, or one member, when the case is pending in court on appeal." We believe a compromise settlement when pending in court, or on appeal, may be approved by the Commission, or a single member of the Commission, or a Referee.

The case of Tokash vs. Workmen's Compensation Commission, et al., 139 S.W. (2d) 978, was before our Supreme Court on appeal on the question whether a stipulation judgment of a Circuit Court, reversing the award of the Commission, was valid, as based upon a settlement and agreement that the case should be reversed with instructions to the Compensation Commission to enter a new award of no compensation, without first obtaining the approval of such compromise settlement by the Workmen's Compensation Commission. The Supreme Court held that the stipulation judgment of the Circuit Court on its face was not invalid, because the Circuit Court did have jurisdiction of the subject-matter and the parties, but that the stipulation judgment of the Circuit Court was without force and invalid, because, as the facts disclosed, the approval of the Compensation Commission had not first been obtained. The Supreme Court held that the judgment of the Circuit Court on the stipulation would have been valid had they presented to the Circuit Court, the case being in the Circuit Court also on appeal, along with the stipulation of settlement and for reversal of the case, the approval of the settlement by the Workmen's Compensation Commission. On this point, and so holding, the Supreme Court, l.c. 984, said:

> "* * * But is the stipulation judgment void on its face? We do not think so. That the circuit court had jurisdiction of the subject matter and the parties in the compensation appeal, cannot be and is not questioned. The only thing that vitiates the stipulation judgment is that it was arrived at without the <u>approval</u> of the commission. There is nothing on the face of the judgment that shows that the approval of the commission was not

> obtained, and, since right action is presumed (Rollins et al. v. Shaner et al., 316 Mo. 953, 292 S.W. 419), the presumption would be that such approval was obtained. But the facts, unfolded, disclose that such approval was not obtained. In the situation, we think that the present suit to set aside will lie, and so rule."

This case is a clear example of approval by our Supreme Court of the right of the Commission or any member thereof, or a Referee, to approve a compromise settlement when pending in Court, or on appeal.

The Tokash case, supra, we believe, is controlling authority on this question and requires us to here hold, and we do hold, that such a settlement may be approved by the Commission, or any member of the Commission, or a Referee, when the case is pending in any Court on appeal.

We believe the authorities we have here cited and quoted, and our conclusions thereon, correctly answer in the affirmative the two questions you submit in paragraph 1 of your letter.

The next question submitted in your letter, contained in paragraph 2 thereof, states: "Is a Temporary or Final Award, or any other decision or order in Workmen's Compensation cases pending before the Industrial Commission, valid when made by only one member of the Commission."

Section 41 of the original Compensation Act (Laws of Missouri, 1925, page 375, l.c. 396) provided that "The commission or any of its members shall hear in a summary proceeding the parties at issue, their respective witnesses and shall determine the dispute, etc." This section authorizing members to conduct hearings was carried down from the original Act into the Revision of 1929 as Section 3339, and in the Revision of 1939 as Section 3729. The original Section 41 (Section 3339, R.S. Mo. 1929), (Section 3729, R.S. Mo. 1939), was repealed, Laws of Missouri, 1945, page 2000, and a new Section 3729 was enacted in lieu thereof.

The new Section 3729, Laws of Missouri, 1945, l.c. 2000, enacted in lieu of Section 3729, R.S. Mo. 1939, omitted the sentence: "The commission or any of its members shall

hear in a summary proceeding the parties at issue and their representatives and witnesses and shall determine the dispute" and inserted in the new Section 3729 in place thereof, the following:

> "The division, through a referee, shall hear in a summary proceeding the parties at issue and their representatives and witnesses and shall determine the dispute. * * * ."

It will be observed that the Legislature in enacting the new section, 3729, giving the Division of Compensation power, through Referees, to hold hearings did not preclude the Commission or separate members of the Commission from holding hearings.

The Legislature in the same Act which included the new Section, 3729 (Senate Bill 248, Laws of Missouri, 1945) enacted also Section 3747--now Section 287.610, RSMo 1949--a part of which said Section 3747 then read, and, now in said Section 287.610 reads as follows:

> "* * * Any award by a referee upon an original hearing shall have the same force and effect, be subject to the same review and appellate procedure, and enforceable in the same manner as provided elsewhere in this chapter for similar awards by the commission or any member thereof. * * * ."

Our present Section 287.610 was Section 3357 in the Revision of 1929. That section in that revision was specifically construed by Judge Bland in the Morgan case, supra, as giving the same authority to Referees to hold hearings as was vested by the statute in the Commission or one of its members. The Kansas City Court of Appeals in said case, l.c. 641, on this question, said:

> "The Legislature in 1929 (see Laws 1929, p. 444) amended what is now section 3357 of the Revised Statutes (Mo. St. Ann. Sec. 3357, p. 8287) (or section 59 of the original act (Laws 1925, pp.375, 402)) by creating the position of referee. The

> amendment allows the commission to appoint special referees, not exceeding five in number. It gives such referees authority to hear and determine claims upon original hearing, only, and in this respect they are given the same authority and jurisdiction as the commission or one of its members. * * * ."

The St. Louis Court of Appeals, 40 S.W. (2d) 503, considered the case of State ex rel. Kenney, et al. vs. Missouri Workmen's Compensation Commission, on the question of whether an appeal could be taken directly to the Circuit Court from an award made by a single Commissioner instead of from a review by the whole Commission. Among other matters discussed in the case the Court, l.c. 504, regarding the intention of the Legislature in providing for a single member of the Commission to act alone in certain cases, said the following:

> "It would thus seem that the Legislature intended and expected that in most cases the claim of an employee would be presented to an individual commissioner or a referee for the obvious purpose of expediting the great number of claims that of necessity arise under the act, and in the belief that a percentage of cases would thus be finally disposed of by the award of such single commissioner or referee, and therefore the Legislature provided that only when either party is dissatisfied with the finding and award of the commissioner, and a rehearing is requested, that it be mandatory for the full commission to review the evidence and make an award, * * * ."

The terms of Section 287.610 are in identical words with the provisions of Section 3357 of the 1929 Revision, which said Section 3357, was construed in the Morgan case, supra, as giving Referees concurrent authority with single members of the Commission to hold hearings. Section 287.610, RSMo 1949, in part, on the question of awards by Referees, reads as follows:

> "* * * Any referee shall have power to approve contracts of settlement between the parties to any claim under this chapter, to the same extent as elsewhere provided for the commission or one of its members. Any award by a referee upon an original hearing shall have the same force and effect, be subject to the same review and appellate procedure, and enforceable in the same manner as provided elsewhere in this chapter for similar awards by the commission or any member thereof. * * * ."

Revealing that it was the intention to still authorize separate members of the Commission, and the Commission itself, to hold and conduct hearings of claims for compensation, the Legislature, at the same Session--1945--where the new Section 3729 provided that the Division, through its Referees, may hold hearings, there was enacted by the Legislature, Laws of Missouri, 1945, page 1101, l.c. 1104, Senate Bill 246, including Section 6 thereof, and containing as a part of said Section 6, sub-section (i), and which sub-section (i) of said Section 6 of the Act is now sub-section (9) of Section 286.060, RSMo 1949, expressly conferring the power to hold and conduct hearings upon the Commission or any member thereof, which sub-section (9) reads as follows:

> "(9) The commission or any member thereof may hold hearings, require the attendance of witnesses, administer oaths and take testimony."

It, therefore, appears plain that the Legislature in enacting said sub-section (9) of said Section 286.060 at the Session of 1945, was fully aware of that part of said Section 287.610, RSMo 1949, and the construction thereof given by the Kansas City Court of Appeals in the Morgan case, supra, as such provision then appeared in Section 3357, R.S. Mo. 1929, giving the Division, through Referees, the same authority to hold hearings as was then and is now possessed by single members of the Commission.

The authority as expressed in said sub-section (9) for the Commission or separate members of the Commission

to hold hearings is comprehensive and entirely without limit as to any particular kind of hearing, and is not restricted to any one of the four divisions of the Department of Labor and Industrial Relations. We believe under the terms of said sub-section (9) the Commission, or any separate member thereof, is authorized to hold a hearing on any question or controversy arising within any of its divisions.

It is our belief, under the above cited statutes and authorities, that a temporary or final award, or any other decision or order in Workmen's Compensation cases pending before the Industrial Commission are valid when made by only one member of the Commission. This is our answer to the question submitted in paragraph 2 of your letter.

In submitting the next and last question, after paragraph 2 in the letter, it is stated:

> "In this connection we cite you to Section 286.010 for creation of the Industrial Commission; to Section 287.560 for powers of the Commission; to Section 287.020 (8) for definition of terms.
>
> "Under Section 287.410 the Industrial Commission may delegate powers to the Division of Workmen's Compensation. Under authority of this section Rules A and B on attached sheet were adopted and filed with the Secretary of State. Also see Section 287.610.
>
> "Question: When a settlement of a case pending before the Division of Workmen's Compensation (not appealed to the Commission) is made, can the Industrial Commission, or one member, approve the same, or does the Division alone have such authority?"

Your letter thus directs our attention in the preparation of this opinion to Section 286.010 of said

Chapter 286, Sections 287.020, 287.390, 287.410, 287.560 and 287.610 of Chapter 287, all RSMo 1949. We have carefully considered the provisions of each of such sections as their terms apply to the questions you submit for our consideration.

Section 286.010, RSMo 1949, creating "The Department of Labor and Industrial Relations" of Missouri reads, in part, as follows:

> "There is hereby created and established a separate department of the state government to be known as 'The Department of Labor and Industrial Relations.' Said department shall be under the control, management and supervision of a commission to be known and designated as 'The Industrial Commission of Missouri.' * * * ."

There are other sections of said Chapters 286 and 287 defining the powers of the Industrial Commission of Missouri, and the Division of Workmen's Compensation, which make them all, jointly, one complete and inseparable department of the State Government of this State, although by Section 286.110, RSMo 1949, there are created within the department four operating divisions. Said Section 286.110 in that behalf, reads as follows:

> "There is hereby created within the department of labor and industrial relations the following divisions:
>
> "(1) The division of workmen's compensation;
>
> "(2) The division of employment security;
>
> "(3) The division of industrial inspection; and
>
> "(4) The division of mine inspection."

Section 286.060, RSMo 1949, defines the duties, powers and jurisdiction of the Industrial Commission of

Missouri in its control, management and supervision of the Department of Labor and Industrial Relations in separate, numbered paragraphs. Said section, respecting such authority in its general preamble and such paragraphs thereof as we believe are pertinent here, read as follow:

> "It shall be the duty of the industrial commission, and it shall have power, jurisdiction and authority:
>
> * * * * * * * * * * * * * * * * * * *
> * * * * * * * * * * * * * * * * * * *
>
> "(3) To have all powers, duties and responsibilities conferred or imposed upon it by the workmen's compensation law (chapter 287, RSMo 1949) and by the unemployment compensation law (chapter 288, RSMo 1949)
>
> * * * * * * * * * * * * * * * * * * *
> * * * * * * * * * * * * * * * * * * *
> * * * * * * * * * * * * * * * * * * *
> * * * * * * * * * * * * * * * * * * *
>
> "(8) To adopt all regulations necessary to the efficient internal management of the department, not inconsistent with any provisions of law, and such regulations shall become effective immediately upon adoption, unless the commission shall otherwise order; to adopt regulations governing its proceedings in connection with the exercise of its quasi-judicial functions, and such regulations shall become effective ten days after copies thereof are filed in the office of the secretary of state.
>
> "(9) The commission or any member thereof may hold hearings, require the attendance of witnesses, administer oaths and take testimony."

In this connection we refer, as suggested in your request for this opinion, to paragraph 8 of said Section

287.020 for terms defined in said paragraph relating to the Division of Workmen's Compensation, named in said Section 286.110, supra, as a division of the Department of Labor and Industrial Relations of this State. We cite and quote also paragraph 9 with paragraph 8 of said Section 287.020, which sections read as follow:

> "8. As used in this chapter and all acts amendatory thereof, the term 'commission' or 'workmen's compensation commission of Missouri' shall hereafter be construed as meaning and referring exclusively to the industrial commission of Missouri, * * * * * * * * * * * * * *.
>
> "9. The term 'division' as used in this chapter means the division of workmen's compensation of the department of labor and industrial relations of the state of Missouri."

We have already observed from the provisions of Section 286.010 that "The Department of Labor and Industrial Relations" and "The Industrial Commission of Missouri" are one and the same entity.

The effect of the noted sections of said Chapters 286 and 287, was, and is, to clearly express the intention of the Legislature to be that the acts, authority, procedure and doings of the Division of Workmen's Compensation in whatsoever that Division, any Referee, or the Workmen's Compensation Commission, or of any member of the Workmen's Compensation Commission, may do, in the exercise of authority, shall be held to be the acts of the Department of Labor and Industrial Relations of Missouri itself.

With your letter you submit for our information and consideration copies of Rules "A" and "B", adopted by the Commission, which, respectively, state:

> "A. It is hereby provided and ordered by the Industrial Commission of Missouri that the Division of Workmen's Compensation shall be and is hereby authorized to exercise all the powers and functions

> of the Commission in the administration of the Missouri Workmen's Compensation Law, except the power and duty to review any award made under said law or hold any hearing or rehearing as authorized by Section 3730 and 3731, R.S. Missouri, 1939, and except such other powers and functions for the exercise of which provision is hereinafter made. It is intended by this provision to delegate all such powers to the Division of Workmen's Compensation and to designate said Division as the agency of the Commission to receive and file claims for compensation, reports, answers, settlements, agreements, applications for review, and notices as may be required by the Workmen's Compensation Law.
>
> "B. Parties to claims under the Workmen's Compensation Law may enter into voluntary agreements in settlement or compromise thereof, but no agreement or contract of settlement or compromise shall be valid until approved by the Commission, or until approved by a Referee of the Division of Workmen's Compensation if the claim is pending in the Division. No such agreement shall be valid unless made after seven days from the date of the injury or death."

Your letter states that said Rules A and B were adopted by the Commission and filed with the Secretary of State by authority of Section 287.410.

Said Section 287.410 reads as follows:

> "The division shall have and exercise such of the powers and functions of the commission in the administration of the workmen's compensation law as the commission may by regulation prescribe; provided, however, that the power and duty to review any award made under the workmen's compensation

> law, as authorized by sections 287.470 and 287.480, may not be delegated, but such power and duty shall be exercised exclusively by the commission; and provided further, that the commission shall exercise no authority with respect to the selection or tenure of office of any individual appointed or employed by the division in the administration of the workmen's compensation law. (L. 1945, p. 1996 Sec. 3744A)."

As we understand said Sections 287.410 and 287.610, and other sections of the Act relating to the creation and powers of the Industrial Commission, the Commission does not, we believe, derive its powers to create and promulgate rules and regulations for the administration of the Act by the Division of Compensation, such as Rules A and B submitted to us, from Section 287.410, RSMo 1949, as your letter states, in paragraph (4) thereof, but, rather, from Section 286.060, RSMo 1949.

Section 287.410 does provide that the Division of Compensation shall have and exercise such of the powers and functions of the Commission, in the administration of the Act, as the Commission may, by regulation, prescribe, etc., but the authority of the Commission to make and define the terms and provisions of such regulations and file them with the Secretary of State is found in sub-section (8) of said Section 286.060, which sub-section states such power as follows:

> "To adopt all regulations necessary to the efficient internal management of the department, not inconsistent with any provisions of law, and such regulations shall become effective immediately upon adoption unless the commission shall otherwise order; to adopt regulations governing its proceedings in connection with the exercise of its quasi judicial functions, and such regulations shall become effective ten days after copies thereof are filed in the office of the secretary of state."

We are advised that said Rules A and B were filed with the Secretary of State by the Industrial Commission on July 7, 1948, and became effective from and after July 18, 1948. In this particular, it then is apparent that the Commission in adopting said Rules, A and B, proceeded under said sub-section (8), supra, of Section 286.060. Rules A and B on the question of their validity, we believe, must be tested by the terms of said sub-section (8), which provides that such rules may be made which are "* * * not inconsistent with any provision of law. * * * ."

The question then presents itself, are said Rules A and B inconsistent with any provision of law?

Rules A and B propose to and do remove the authority to approve settlements and hold hearings, receive and file claims for compensation, answers, agreements, applications for review and notices required by the Act from the Commission itself, and from the separate members of the Commission and vest such authority exclusively in the Division. Rule A authorizes the Division to exercise all the powers and functions of the Commission in the administration of the Workmen's Compensation law, except those authorized by Sections 287.470 and 287.480. Rule B provides that no agreement or contract of settlement or compromise shall be valid until approved by the Commission or by a Referee of the Division, if the claim is pending in the Division. Both of said Rules A and B apparently intend to combine and make applicable the terms of both said Sections 287.410 and 287.610 in effecting such rules. This is especially noticeable since Section 287.610 deals principally with the appointment and duties of the Referees , the appointment of whom is provided for in said section. So that, in the authority exercised under Section 287.410, to adopt Rules A and B, the terms of Section 287.610 are relied upon--since, in the last sentence of paragraph 4 of your letter requesting this opinion you especially direct our attention to said Section 287.610--in providing for the Division to perform all and sundry the functions of the Commission, because the Referees of the Division are the only officers of the Division upon whom such duties could be placed. A careful reading of said Section 287.610 discloses that the terms of the section itself render said Rules A and B inconsistent with the section in respect to the exercise of the power to approve settlements by the Commission or a member, where one sentence of the section states:

> "* * * Any referee shall have power to approve contracts of settlement between the parties to any claim under this chapter, to the same extent as elsewhere provided for the commission or one of its members. * * * ."

Likewise, Rules A and B are in conflict and inconsistent with said Section 287.610 in depriving the Commission and separate members of the Commission of the right to hold hearings and make awards. The section, in part, states the following:

> "* * * Any award by a referee upon an original hearing shall have the same force and effect, be subject to the same review and appellate procedure, and enforceable in the same manner as provided elsewhere in this chapter for similar awards by the commission or any member thereof. * * * ."

Sub-section (9) of said Section 286.060 provides that the Commission or any member thereof may hold hearings, require the attendance of witnesses, administer oaths and take testimony. Said Rules A and B conflict and are inconsistent with that provision of law.

Said Rules A and B in depriving the Commission and the separate members thereof of the right to make orders, awards and to hold hearings are in conflict and inconsistent with the terms of Section 287.240, RSMo 1949, which provides in sub-section (3) of paragraph 4 thereof, with respect to the distribution of compensation due dependents of a deceased employee under the Act, that:

> "The commission, any member thereof or a referee may, in its or his discretion, order or award the share of compensation of any such child or children to be paid to the parent, grandparent, or other adult next of kin or legal guardian of such child or children for the latter's support, maintenance and education, * ** ."

Rules A and B deprive the separate members of the Commission of the right to approve compromise settlements of claims, and are thereby in conflict and inconsistent with Section 287.390, RSMo 1949 (Section 3333, R.S. Mo. 1929) as construed by the Kansas City Court of Appeals in the Morgan case, 91 S.W. (2d) 638, and with that decision itself and other decisions by our Courts of Appeals which, while not ruling directly that separate members of the Commission may exercise the right to approve compromise settlements of claims, do discuss and in effect hold that the intent of the Legislature, expressed in the statutes in permitting separate members of the Commission, Referees and the Commission to approve settlements encouraged voluntary settlements, and those cases commended the approval of settlements by separate members of the Commission. To quote from such cases would unduly and without need lengthen this opinion, and for that reason we omit quoting from such cases but for the convenience of the reader we give the style and citation of such cases.

Burnham vs. Keystone Ser. Co., 77 S.W. (2d) 848, (Mo. App.), l.c. 854;
Brown vs. Corn Products Refining Co., 55 S.W. (2d) 706, (Mo. App.), l.c. 710.

We believe, and here so conclude, that said Rules A and B adopted by the Commission, insofar as such rules deprive the Commission and its separate members of the authority to perform the official functions connected with the administration of the Workmen's Compensation Act which are named and prohibited to such officials in such rules and by providing that such functions shall be performed only by the Division of Workmen's Compensation are ineffective and invalid.

Considering the above-cited and quoted decisions of our Courts, the provisions and terms of our statutes cited and quoted, as they express the clear intention of the Legislature in regard to the subject, we believe, in answer to your last question, that when a settlement of a case, pending before the Division of Workmen's Compensation (not appealed to the Commission), is made, the Industrial Commission, or one member, or a Referee may approve the same, and that the Division alone does not have such authority, and that, as we have hereinabove held in answering questions 2 and 3 submitted to us, it would make no difference where a case is pending

after a claim is filed, the Commission itself, any individual member of the Commission, or a Referee representing the Division, is vested by such authorities with the power to approve a compromise settlement of a claim for compensation.

CONCLUSION.

It is, therefore, the opinion of this Department, considering the premises, that:

1) A compromise settlement of a Workmen's Compensation claim under Section 287.390, RSMo 1949, is valid when approved by only one member of the Industrial Commission when the case is pending before the Commission.

2) A settlement may be approved by the Commission or one member or a Referee, when the case is pending in Court on appeal.

3) A temporary or final award, or any other decision or order in Workmen's Compensation cases pending before the Industrial Commission except the power and duty to review any award made under the Workmen's Compensation Law as authorized by Sections 287.470 and 287.480, RSMo 1949, are valid when made by only one member of the Commission.

4) When a settlement of a case pending before the Division of Workmen's Compensation (not appealed to the Commission) is made, the Industrial Commission or one member thereof, or a Referee of the Division of Workmen's Compensation may approve the same, and the Division alone does not have such authority.

5) Rules A and B adopted by the Commission are in conflict and inconsistent with the provisions of law hereinabove pointed out, and are invalid.

Respectfully submitted,

APPROVED:

J. E. TAYLOR
ATTORNEY GENERAL

GEORGE W. CROWLEY
ASSISTANT ATTORNEY GENERAL

GWC:ir

SOCIAL SECURITY:
COUNTY HEALTH CENTER:

Employer's contributions on county health center employees are paid from the county health center fund.

FILED
39

April 16, 1952

4-16-52

Honorable George Henry
Prosecuting Attorney of
Newton County
Neosho, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this department, which request reads in part as follows:

> "A question has arisen in this county as to who is liable for the Social Security on pay to County Health Center employees. Section 205.042 laws of the 66th General Assembly provide for the organization, powers, and duties of the trustees of the County Health Center. The last part of Paragraph 4 of said Section states that:
>
> > 'All moneys received for the County Health Center shall be deposited in the County Treasury to the credit of the County Health Center Fund and paid out only upon warrants ordered drawn by the County Court upon properly authenticated vouchers of the Board of Health Center Trustees.'
>
> "Our question is does the establishment of this special fund make the Health Center employees in effect employees of a separate organization and as such make the County Health Center Fund liable for the Social

> Security to be withheld, or is the Social Security from the Health Center employees wages to be paid out of the County Revenue Fund?"

Section 5, subsection 1 of Senate Committee Substitute for Senate Bill No. 3, provides for the coverage of public employees other than those in the employ of the State as follows:

> "Each political subdivision of the state and each instrumentality of the state or of a political subdivision may submit for approval by the state agency a plan for extending the benefits of Title 2 of the Social Security Act to its employees, and are hereby authorized to, by proper ordinance or resolution, enter into and ratify any such agreement upon its approval as aforesaid. * * *"

The term political subdivision is defined in Section 1, subsection 7 as follows:

> "'Political subdivision', any county, township, municipal corporation, school district, or other governmental entity of equivalent rank; * * *."

Section 1, subsection 6 defines the term instrumentality to be "an instrumentality of the state or of one or more of its political subdivisions but only if such instrumentality is a juristic entity which is legally separate and distinct from the state or such political subdivision and whose employees are not by virtue of their relation to such juristic entity employees of the state or such subdivision." This definition was interpreted by this department in an opinion to the Honorable John E. Downs, Prosecuting Attorney of Buchanan County, St. Joseph, Missouri, October 25, 1951, to mean a corporate entity legally separate and distinct from the state or political subdivision.

It is quite apparent that the county health center is not a political subdivision or instrumentality as defined in Senate Committee Substitute for Senate Bill No. 3. Section 205.010 of House Bill No. 307, as enacted by the 66th General Assembly provides that any county may, as provided in this act, "establish, maintain, manage and operate a public health center if the qualified voters of the county elect by voting a tax for the maintenance and operation of a county health center to establish same." The county court shall

appoint five trustees to manage and operate such health center for the county. Section 205.030, House Bill No. 307. Thereafter, said trustees shall be elected at the next following general election. Section 205.045, subsection 5, provides that the board of health center trustees may appoint such personnel as may be necessary for the operation of the health center as follows:

> "The board of health center trustees may appoint and remove such personnel as may be necessary and fix their compensation; and shall in general carry out the spirit and intent of this chapter pertaining to establishing and maintaining a county health center."

Such employees as may be appointed under the provisions of this section are employed by the official board acting for the county and are discharging duties of an authorized and proper county function and would therefore, for the purpose of Senate Bill No. 3 be county employees.

Section 205.020 of House Bill No. 307, provides for the collection and disposition of the taxes for county health center purposes as follows:

> "If a two-thirds majority of the votes cast at such election on the proposition so submitted, shall vote in favor of such tax, the county court shall proceed to levy and collect such tax and deposit same in the county treasury to the credit of the health center fund and such fund shall be expended as hereinafter provided."

Section 205.045, subsection 4 again provides for the disposition of funds received for the county health center as follows:

> "* * *All moneys received for the county health center shall be deposited in the county treasury to the credit of the county health center fund, and paid out only upon warrants ordered drawn by the county court upon properly authenticated vouchers of the board of health center trustees."

As you have indicated, the employees of the county health center are paid from this fund. However, the establishment of such special fund would not change such employees' status as county

employees since the money so collected is nonetheless county funds although it is deposited in a special fund separate and apart from the general revenue of the county. However, since the county health center is for the purpose of maintaining and operating the county health center, including the salary of health center employees, we are of the opinion that the employers' contribution due upon these county employees would be classed as an operating expense of the county health center and properly chargeable to the county health center fund and so paid.

CONCLUSION

Therefore, it is the opinion of this department that the county health center employees, for the purpose of Senate Committee Substitute for Senate Bill No. 3, are covered under county employees and the county's contribution as employers would be paid from the county health center fund since such employees are paid from the county health center fund and not from the general revenue of the county.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JET:hr

COUNTY TREASURERS: Cost of envelopes and postage required to carry out duties imposed by H.B. 199, 66th General Assembly is expense incident to the office and not one to be personally borne by officer carrying out such duties.

FILED
39

May 1, 1952

5-2-52

Honorable George Henry
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Sir:

The following opinion determines whether the county treasurer of Newton County is personally obligated to furnish envelopes and postage necessary for mailing forms for the use of citizens who are required to make property tax returns on intangibles as provided by Section 146.050 R.S. Mo. 1949, the added duty of furnishing such forms to the citizens being imposed on the county treasurer by House Bill No. 199, passed by the 66th General Assembly of Missouri.

House Bill No. 199, supra, provides as follows:

> "Section 1. It shall be the duty of the state director of revenue to furnish, on or before the first day of January in each year, to the county treasurers of each county under charter form of government and to the county treasurers of class two, three and four counties in this state, forms for the use of the citizens of this state to make property tax returns on intangibles as provided by section 146.050, R.S.Mo. 1949, in sufficient number to meet the needs of the respective counties. At the same time the director shall furnish to each treasurer a list of the intangible taxpayers of the respective counties who filed a state intangible tax return the preceding year.

Section 2. 1. On or before the fifteenth day of January of each year every county treasurer shall mail to each intangible taxpayer as listed by the director of revenue, and to such other persons as he may have reason to believe may be possessed of taxable intangible property a form prescribed and furnished by the director of revenue, together with a brief statement of what is required of the taxpayer under the provisions of this act. Every county treasurer shall mail, on or before the first day of February of each year, to the Director of Revenue, a list of the additional names to whom he has mailed said form, which said list of additional names shall be added to the list held by the Director of Revenue as those who have intangible personal property subject to taxation.

2. The county treasurer shall keep all such lists strictly confidential and shall not reveal the contents thereof to any person except as herein provided.

Section 3. For the additional duties imposed upon county treasurers by section 2 of this act, they shall receive the following additional compensation, to be paid in the same manner and from the same funds as county treasurers are now paid provided said treasurers shall have used diligence in securing and preparing the additional list and shall have forwarded the same to the Director of Revenue.

(1) In class four counties six hundred dollars per annum.

(2) In class three counties having a population of less than twelve thousand five hundred, six hundred dollars per annum.

(3) In class three counties having a population of more than twelve thousand five hundred but less than thirty thousand, eight hundred dollars.

(4) In class three counties having a population of more than thirty thousand, one thousand dollars.

(5) In class two counties, one thousand dollars.

> (6) In counties under charter form of government a compensation to be fixed by the County Council."

A reading of the Act above quoted discloses that additional duties are imposed on county treasurers with respect to intangible property tax returns, and additional compensation is provided for carrying out those duties. Nowhere in the Act do we find any language indicating that any necessary expense incurred in carrying out the new duties is to be personally borne by the person performing such duties. The new duties are as much a part of the county treasurer's official duties as any other act he is required by statute to perform.

Section 54.110 R.S.Mo. 1949, applicable to every county treasurer in this State, provides as follows:

> "He shall provide, under the direction of the county court, suitable books and stationery for his office, and preserve the same; and the court shall audit his account, and allow such sum as shall be reasonable, which shall be paid by the county."

Under the provisions of House Bill No. 199, supra, the county treasurer is faced with the mandatory duty of mailing forms to potential taxpayers. It is a duty he must perform and one which necessitates an expenditure of money for which no provision is made by the Act creating the duty. We feel that the law on this point is clearly expressed in Ewing v. Vernon County, 216 Mo. 681, l.c. 695, where the Court spoke as follows:

> "Where * * * the law requires an officer to do what necessitates an expenditure of money for which no provision is made, he may pay therefor and have the amount allowed him. Prohibitions against increasing the compensation of officers do not apply to such cases. Thus, it is customary to allow officers expenses of fuel, clerk hire, stationery, lights, and other office accessories."

A review of the language contained in the letter directed to all county treasurers by the Director of Revenue on November 15, 1951, wherein it is said that "It will be

necessary for you to supply the envelopes as well as the postage for the mailing," does not in our opinion convey any meaning at variance with the conclusion hereinafter reached.

CONCLUSION

It is the opinion of this department that the cost of envelopes and postage required to carry out the new and additional duties imposed upon county treasurers by House Bill No. 199, passed by the 66th General Assembly, is an expense incident to the office and not one to be borne personally by the officer carrying out such duties.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

TAXATION: Delinquent personal property taxes, except interest and penalties, cannot be compromised.

COMPROMISING TAXES:

May 28, 1952

39

Mr. Rex A. Henson
Prosecuting Attorney
Butler County
Poplar Bluff, Missouri

Dear Mr. Henson:

We have given careful consideration to your request for an opinion, which request is as follows:

> "The Collector of Revenue of Butler County, Missouri, is instituting suits for collection of delinquent personal property taxes as provided in Section 140.730 of the Revised Statutes of 1949, and it now appears that quite a number of the delinquent tax payers are insolvent; that several of them have left this State and do not have any property subject to execution; and that several of these persons have offered to make a compromise settlement of their delinquent personal property taxes.
>
> "I note that Section 140.120, Revised Statutes of 1949, gives the County Court authority to compromise back taxes on real estate under certain conditions, but I fail to find any authority for a compromise of delinquent personal property taxes.

> "I would appreciate an opinion from you advising me if personal property taxes can be compromised, and the officer or officers who have the power to make a compromise settlement."

There is no statute in Missouri authorizing a compromise of delinquent personal property taxes. Moreover, the organic law of the state prohibits the enactment of any such legislation.

The Constitution of Missouri, in Section 39(5) of Article III, provides that the legislature shall have no power "To release or extinguish or to authorize the releasing or extinguishing, in whole or in part, without consideration, the indebtedness, liability or obligation of any corporation or individual due this state or any county or municipal corporation;...."

This provision in substance is the same as Section 51 of Article IV of the Constitution of 1875, and the courts have held that a tax is an obligation under this section and, therefore, cannot be released or compromised.

In the case of Graham Paper Company v. Gehner, 332 Mo. 155, l.c. 162, the Supreme Court of Missouri said:

> "* * * The language of this constitutional provision is very broad and comprehensive in protecting the State against legislative acts impairing obligations due to it in that it prohibits the release or extinguishment, in whole or in part, not only of indebtedness to the State, county or municipality, but liabilities or obligations of every kind. It will be noticed that this constitutional provision is couched in the language and uses the same terms as are used with reference to retrospective laws. In determining what transactions or considerations are within the purview of retrospective laws, the courts use the same terms as are used in this

> constitutional provision, to-wit, liabilities or obligations, as well as debts. In contending in the Dirckx and Bell Telephone cases, supra, that income taxes not due or capable of ascertainment till the end of the year could not be the subject of a retrospective law, the same argument was used as is now used to exclude same from the constitutional provision just quoted, to-wit that the income tax for the entire year is a unit and does not come into existence even as an obligation or liability till the end of the year, when for the first time it was capable of ascertainment. That would be true as to being an indebtedness, but, as there pointed out, it is not true as to being an obligation or liability. This argument was rejected as not sound in the Dirckx and Bell Telephone cases, as it must be here. It was there held that an inchoate tax, though not due or yet payable, is such an obligation or liability as to be within the protection of the restriction against retrospective laws, and for the same reason we must hold that such inchoate tax is an obligation or liability within the meaning of the constitutional provision now being considered. In other words, if an unmatured tax has sufficient vitality to be protected in favor of the citizens against retrospective laws, it has sufficient vitality to be protected in favor of the State against being extinguished or released by legislative enactment."

This principle was sustained by the Supreme Court in the more recent case of State v. Smith, 201 S.W. 2d 153. In the course of that opinion, at page 156, the court said:

> "We agree with appellant that respondent did not have authority to compromise a tax that had been lawfully assessed. * * *"

It has been held, however, that the interest and penalties of a delinquent tax bill may be compromised, as they are no part of the tax.

In the case of State ex rel. Crutcher v. Koeln, 332 Mo. 1229, l.c. 1239, the Supreme Court said:

> "Penalties are a mere adjunct, of a nature quite different from taxes as already shown, and are provided merely as an aid in enforcing the collection of the latter. Notwithstanding they may be indicated on the back tax books or tax bills, they are no more than inceptive down to the moment of their infliction by actual exaction and receipt of payment, or by distraint had or judgment obtained. * * *"

This principle was also upheld in State v. Smith, supra. In the course of that opinion, at page 157, the court said:

> "There is nothing in the Constitution or statutes that would prohibit respondent from compromising the interest and penalties in a disputed sales tax liability."

The question as to what officer has the power to make a compromise settlement is resolved by application of Section 140.730, RSMo 1949, which authorizes the county collector to institute suits for the collection of delinquent personal property taxes. An officer having such power is also vested with authority to compromise claims in cases where compromise is permitted by law.

The Supreme Court of Missouri sustained this rule in State v. Smith, supra. In the course of that opinion, at page 157, the court said:

> "Respondent contends that since the Sales Tax Act gives him the power to sue for the tax, it necessarily gives him the implied power to settle the tax, except where he is prohibited from doing so by law. He, therefore, contends that he has the power to compromise interest and penalties. We think respondent's contention must be sustained."

CONCLUSION

It is the opinion of this office that delinquent personal property taxes cannot be compromised. It is our further opinion, however, that the interest and penalties of a delinquent personal property tax bill may be compromised by the county collector.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROV D:

J. E. TAYLOR
Attorney General

BAT/fh

CRIMINAL LAW: Magistrate judge must hear and determine careless
PROSECUTING and reckless driving cases, a misdemeanor brought by
ATTORNEY: information filed by the prosecuting attorney even though the evidence tends to show the defendant might have been charged with the felony of driving while intoxicated.

January 24, 1952 1-25-52

FILED
40

Honorable Wilson D. Hill
Prosecuting Attorney
Ray County
Richmond, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion, which reads:

"This office respectfully requests an opinion concerning the discretion and power of the Magistrate Judge under Section 543.280 which section is entitled:

"'Offense not cognizable before magistrate--procedure.--'

"and which reads as follows:

"'If, in the progress of any trial before a Magistrate, under the provisions of this chapter, it shall appear that the accused ought to be put upon his trial for an offense not cognizable before a magistrate, the magistrate shall immediately stop all further proceedings before him, and proceed as in other criminal cases exclusively cognizable before the Circuit Court, or other court in the county having jurisdiction thereof.'

"The facts pertaining to the controversy are as follows: A complaining affidavit for information was filed by a State Patrolman with the Assistant Prosecuting Attorney of Ray County, Missouri. The charge set out in the affidavit was as follows:

"'Defendant did then and there wilfully and unlawfully drive and operate a motor vehicle, to-wit: a 1941 Chevrolet Pick-Up, in and upon the public Highways of Ray County, Missouri, in a careless, reckless and

imprudent manner, in that he did weave the said motor vehicle from one side to another, against the peace and dignity of the State.'

"This affidavit was a complaint of careless and reckless driving.

"The information filed by the Assistant Prosecuting Attorney read as follows:

"'Defendant did then and there wilfully and unlawfully drive and operate a certain motor vehicle to-wit: a 1941 Chevrolet Pick-up in and on the public highways of Ray County, Missouri, in a careless, reckless and imprudent manner, and did fail to exercise the highest degree of care of the said motor vehicle, in that he did weave said motor vehicle from one side of the highway to the other, so as to endanger the life, limb and property of others, contrary to the form of the Statute, in such cases made and provided, and against the peace and dignity of the State.'

"This information charged the defendant with careless and reckless driving.

"At the hearing before the Magistrate Court of Ray County, Missouri, the patrolman, who was also the arresting officer and complaining witness testified that the defendant had been drinking and in his opinion, the defendant was drunk. Thereupon, the Magistrate Judge, stopped the proceedings and informed the Assistant Prosecuting Attorney, who was representing the State, that the Magistrate Court of Ray County, Missouri had no jurisdiction over this case, because the Assistant Prosecuting Attorney should have filed an information against the defendant, charging him with driving while intoxicated, which is a felony.

"It is the position of the Prosecuting Attorney's Office of Ray County, Missouri, that the Prosecuting Attorney does have the discretionary power to determine whether he

> should file an information charging a particular defendant with a misdemeanor or felony. It is also the position of the Prosecuting Attorney's Office of Ray County, Missouri, that under Section 543.080, the magistrate is under a statutory duty to hear cases in which defendants are charged with misdemeanors, where such cases are filed in Magistrate Court."

Section 543.280, RSMo 1949, has never been construed by our appellate courts, but it is our opinion that the purpose of this section is to prevent a defendant from escaping trial for a felony when he has been charged and is being tried for a misdemeanor, and was not intended to give a magistrate judge the power to determine with what offense a defendant should be charged. This power, or discretion, is one vested in the prosecuting attorney as will be shown later in this opinion. This section is from the Revised Statutes of Missouri, 1835, and was in relation to the office of justice of the peace, who was not required to be a lawyer. It could hardly be said that such a discretion as to legal questions would have been delegated to a layman by the Legislature.

It is also our opinion that this section only applies to cases or offenses which have different degrees, of which the misdemeanor is one. In support of this conclusion, we cite a similar statute applicable to trials for misdemeanors in circuit courts. Section 556.210, RSMo 1949, provides:

> "If, upon the trial of any person for any misdemeanor it shall appear that the facts given in evidence amount in law to a felony, such person shall not, by reason thereof, be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterward prosecuted for felony on the same facts, unless the court before which such trial may be had shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor."

The court, in construing this section, said in the case of State v. Martin, 76 Mo. 337, l.c. 340:

> "It is claimed by counsel that the plea in bar was effectual as to both offenses under section 1653, Revised Statutes, which provides, 'that if upon the trial of any person for any misdemeanor it shall appear that the facts given in evidence, amount in law to a felony, such person by reason thereof shall not be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable afterward to be prosecuted for felony on the same facts, unless the court shall think fit in its discretion to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for a felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor.'
>
> "This section has no reference to an independent offense which may be disclosed by the evidence relating to the misdemeanor charged, and for which a party is on trial, but has application to that class of offenses, of which there are different degrees or grades, and of which grades or degrees the misdemeanor charged is one. The present case affords an illustration of its meaning. There are two grades of larceny, one grand and the other petit larceny, one a felony and the other a misdemeanor. Defendant was tried by the justice on a charge of petit larceny, the evidence adduced in support of the charge showed that the larceny being committed at the same time a burglary was committed, was grand larceny, and, therefore, a felony. The justice might, under the statute, have discharged the jury and bound the defendant over to answer an indictment to be preferred for the higher offense. This he did not do, but tried and sentenced him for the misdemeanor, and thereby exempted him from further prosecution for the higher grade of larceny charged by the indictment. * * * "

The question, or rather the offenses involved in your request, namely, careless and reckless driving, a misdemeanor, and driving while intoxicated, a felony, are not degrees of the same offense, but each is a separate statutory offense and not covered by these statutes.

It is the duty and power of the office of prosecuting attorney to determine when, how and against whom criminal proceedings shall be initiated. As a matter of course, this discretion must be exercised in good faith. In the case of State v. Wallach, 182 S.W. (2d) 313, l.c. 318, the Supreme Court of Missouri clearly defined the powers and duties of the prosecuting attorney. They said:

> "'The duty of a prosecuting officer necessarily requires that he investigate, i.e., inquire into the matter with care and accuracy, that in each case he examine the available evidence, the law and the facts, and the applicability of each to the other; that his duties further require that he intelligently weigh the chances of successful termination of the prosecution, having always in mind the relative importance to the county he serves of the different prosecutions which he might initiate. Such duties of necessity involve a good faith exercise of the sound discretion of the prosecuting attorney. "Discretion" in that sense means power or right conferred by law upon the prosecuting officer of acting officially in such circumstances, and upon each separate case, according to the dictates of his own judgment and conscience uncontrolled by the judgment and conscience of any other person. Such discretion must be exercised in accordance with established principles of law, fairly, wisely, and with skill and reason. It includes the right to choose a course of action or non-action, chosen not willfully or in bad faith, but chosen with regard to what is right under the circumstances. Discretion denotes the absence of a hard and fast rule or a mandatory procedure regardless of varying circumstances. That discretion may, in good faith (but not arbitrarily), be exercised with respect to when,

> how and against whom to initiate criminal proceedings. Watts v. Gerking, 111 Or. 641, 228 P. 135, 34 A.L.R. 1489. Such discretion so vested by law in the prosecuting officer is both official and personal. Engle v. Chipman, 51 Mich. 524, 16 N.W. 886. Such discretion exercised in good faith authorizes the prosecuting officer to personally determine, in conference and in collaboration with peace officers and liquor enforcement officers, that a certain plan of action or a certain policy of enforcement will be best productive of law enforcement, and will best result in general law observance. * * * * * * * "

Under Section 543.080, RSMo 1949, it is the duty of the magistrate to hear cases brought before him on information filed by the prosecuting attorney. This duty, as imposed by this section, is mandatory in its direction. Section 543.080 is as follows:

> "When the defendant shall be brought before the magistrate, or shall be held in custody, charged by information with any misdemeanor, it shall be the duty of the magistrate, unless a continuance be granted, forthwith to hear the case as herein provided."

CONCLUSION

It is the opinion of this department that the magistrate judge has no power or authority to refuse to hear and decide a case in which a defendant is charged by an information filed by the prosecuting attorney with the misdemeanor of careless and reckless driving, even though the evidence tends to show the defendant might be charged with the felony of driving while intoxicated.

Respectfully submitted,

APPROVED:

W. BRADY DUNCAN
Assistant Attorney General

J. E. TAYLOR
Attorney General

WBD:VLM

COUNTY COURT,)
) The county court has no authority to contribute
) county funds to aid in the construction of a
SEWER SYSTEM:) sewer system.

FILED
40

May 12, 1952

Mr. Roger Hibbard
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Mr. Hibbard:

We have given careful consideration to your request for an opinion, which request is as follows:

> "The county court of Marion County has asked that I request of your office an opinion concerning the following matter:
>
> "At the city limits of the city of Hannibal there presently exists a condition wherein raw sewage is being expelled into Bear Creek from homes located within the county, and also from homes located within the city limits. The city of Hannibal has proposed to take into the city limits a portion of the county wherein this condition exists, with the understanding that property owners pay to install the sewer and that the city will erect a lift station in the sewer line to pump the sewage up and into the sewage system of the city. After the completion of this system there will still be certain homes located within Marion County which will use the sewer system and benefit from the lift station. In addition some of the county residents will no longer be discharging raw sewage into the creek which flows through the city.

Mr. Roger Hibbard

> The City Council has requested of the Marion County Court an appropriation of Sixteen Hundred Dollars ($1600.00), which share is approximately one-third (1/3) of the costs of this lift station and the county court is desirous of knowing if they have a legal right to contribute to this purpose outlined above.
>
> "We respectfully request an opinion from your office concerning the authority of the county court in the above matter."

The Constitution of Missouri, in Section 16 of Article VI, authorizes municipalities and political subdivisions of the state to enter into contract and cooperate in the construction and operation of public improvements, in the manner provided by law. The legislature made this provision effective in 1947 by enactment of what is now Section 70.220, RSMo 1949. This section, however, provides "that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision."

The question now under consideration is whether or not a county, through its county court, may appropriate county funds to aid in the construction of a sewer system. Does any such purpose lie within the scope of the powers of the county or its governing board? We fail to find any statute giving, either by expression or by implication, any such authority to the county court.

The Supreme Court of Missouri has in numerous cases held that the county court has only such powers as have been granted to it by law. In King v. Maries County, 297 Mo. 488, l.c. 496, the court said: "It has been held uniformly that county courts are not the general agents of the counties, or of the State. Their powers are limited and defined by law. They have only such authority as is expressly granted them by statute." In Jensen v. Wilson Township, 346 Mo. 1199, l.c. 1203, the court said: "A county court is only the agent of the county with no powers except those granted and limited by law, and like all other agents, it must pursue its authority and act within the scope of its powers."

Mr. Roger Hibbard

CONCLUSION

It is the opinion of this office that the county court does not have a legal right to contribute county funds to a city for the purpose of aiding in the construction of a sewer system.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

BAT/fh

COUNTY CENTRAL COMMITTEE MEMBERS: County Central Political Committee elected officials. Membership not incompatible with holding an elective county or municipal office. Position of special road commissioner not incompatible with elective position of alderman or councilman of a municipality under Secs. 233.170-233.315, RSMo 1949.

SPECIAL ROAD DISTRICT COMMISSIONER:

October 30, 1952 10/31/52

FILED
40

Mr. Andrew J. Higgins
Prosecuting Attorney
Platte County
Platte City, Missouri

Dear Mr. Higgins:

This will acknowledge receipt of your request for an official opinion of this department which reads as follows:

> "1. Are members of the county central political committee officers in such a sense as to render such membership incompatible with holding a county or municipal office?
>
> "2. Is the position of special road commissioner, acting under Sections 233.170-233.315, RSMo. 1949, inclusive, incompatible with the position of alderman or councilman of a municipality?"

In answer to the first question, the Supreme Court of Missouri in State v. Hamilton, 240 S.W. 445, l.c. 447, said as follows:

> "Not only therefore, by our rulings, but in harmony with those in the jurisdiction from whence we derived our law, we are authorized in holding that the position held by a political committeeman elected under the authority of the statutes is such as to entitle his position to be classified as in the nature of that of a public officer."

The holding by the court of course classified the office of county central committee member a public office.

The Supreme Court of Missouri states the rule regarding incompatibility of public office in State ex rel. v. Bus, 135 Mo. 325, l.c. 338, where it says:

Mr. Andrew J. Higgins

> "At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

It does not appear to us, using the foregoing rule as a measure, that the office of a party central committee member is incompatible with holding county or municipal office, unless the Constitution or statutes of Missouri by their terms prohibit it.

We therefore are of the opinion that members of a county central political committee are not officials in such a sense as to render such membership incompatible with holding a county or municipal office.

The answer to your question regarding the special road commissioner, to whom you refer, is one of a special road district not under township organization such as is contemplated by Sections 233.170 to 233.315, inclusive, RSMo 1949, we, in this answer, are of the opinion that the position of a special road commissioner of a special road district organized under these sections is not incompatible with that of alderman or councilman of a municipality within such district. The rule is the same here in answer to this question as it was in the Bus case in answer to the first question.

CONCLUSION

It is, therefore, the opinion of this department that:

(1) The office of a party central committee member is not incompatible with the same individual member holding county or municipal office, unless specifically prohibited by statute or the Constitution of Missouri.

(2) The position of special road commissioner in special road districts in counties not under township organization as contemplated by Sections 233.170 to 233.315, inclusive, supra, is not incompatible with the position of alderman or councilman of a municipality within such district.

APPROVED:

J. E. TAYLOR
Attorney General

Respectfully submitted,

A. BERTRAM ELAM
Assistant Attorney General

ABE:mw

ASSESSOR'S FEES:
THIRD AND FOURTH
CLASS COUNTIES:

Neither the Constitution of 1945, nor RSMo 1949, prescribe a maximum amount of fees that may be received and retained by assessors in third and fourth class counties. Said assessors are legally entitled to receive and retain every fee accruing to their offices annually as compensation for their services.

FILED
41

January 18, 1952 1-21-52

Honorable W. H. Holmes, Auditor
State of Missouri
State Capitol Building
Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which request reads as follows:

> "Please furnish this department with an official opinion on the following question:
>
> "What is the maximum amount of fees that an Assessor may retain, exclusive of salaries paid to deputies, in third and fourth class counties, since the provisions of Section 13, Article IX, of the 1875 Constitution of Missouri, have been omitted from the 1945 Constitution of Missouri?"

The statement is made in your letter that Section 13, Article IX of the Constitution of 1875, has been omitted from the Constitution of 1945 and you make the inquiry as to what the maximum amount of fees, exclusive of salaries paid to deputies, assessors of third and fourth class counties may retain.

Section 13, Article IX, of the Constitution of 1875, referred to above, did provide a limit of the amount of fees, exclusive of salaries paid to necessary deputies, which might be paid to any county or municipal officer in any one year. Said section read as follows:

> "The fees of no executive or ministerial officer of any county or municipality, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of ten thousand dollars for any one year. Every such officer shall make return quarterly, to the county court of all fees by him received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail, and verifying the same by his affidavit; and for any statement or omission in such return, contrary to truth, such officer shall be liable to the penalties of willful and corrupt perjury."

This "limitation" section has been omitted from the 1945 Constitution, and the only reference made in same to the compensation of all county officers, except those of counties operating under their own charters, is that found in Section 11, Article VI, which reads as follows:

> "Except in counties which frame, adopt and amend a charter for their own government, the compensation of all county officers shall be prescribed by law uniform in operation in each class of counties. Every such officer shall file a sworn statement in detail, of fees collected and salaries paid to his necessary deputies or assistants, as provided by law."

The compensation of the county officers referred to is not fixed, but it is noted that such compensation is to be provided by the statutes, and that such statutes shall be uniform in operation in each class of counties. Therefore, it appears that the function of the constitutional provision is to direct us to the appropriate statutes fixing the compensation of such county officers, and is applicable to that of assessors in third and fourth class counties.

The office of assessor in third and fourth class counties appears to be an exception to the rule that the framers of the Constitution, and the legislature, in the enactment of necessary laws in conformity to the Constitution, intended that county officials should receive salaries only as compensation for their services.

Honorable W. H. Holmes

No provision of the Constitution of 1945 or of the Missouri Revised Statutes of 1949 impose the duty upon the assessors of third and fourth class counties to collect every fee accruing to their offices and to pay over all such fees to the treasurers of their respective counties. In the absence of any such provisions, it is assumed that it was the intention of the lawmakers that such assessors should be compensated for their services only by fees collected by them each year, and also since no maximum amount of fees has been provided, it is our thought that assessors in third and fourth class counties are entitled to receive and retain for their services annually, every fee accruing to them in their official capacity.

CONCLUSION

It is the opinion of this department that neither the Missouri Constitution of 1945, or the Revised Statutes of 1949, prescribe the maximum amount of fees which assessors of third and fourth class counties are entitled to receive and retain, but that such assessors are entitled to receive and retain all fees accruing to their offices annually, as compensation for their services.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PNC:hr

COUNTY CLERKS: County clerks of third and fourth class counties are entitled to charge both the state and county the

FEES AND SALARIES: fees provided for duties regarding manufacturer and railroad tax books. Such fees are unaccountable.

FILED
41

January 29, 1952

2-20-52

Honorable W. H. Holmes
State Auditor
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your opinion request regarding the payment and accountability of certain fees to county clerks of third and fourth class counties. Your request reads in part:

> "Are County Clerks in third and fourth class counties entitled to charge both the State and County, the fees for making the Merchants and Manufacturers and Railroad Tax Books, provided in Sections 150.340 and 151.290, R. S. Mo. 1949, respectively?
>
> "Also, are said fees accountable or non-accountable?"

The duties of county clerks with respect to the manufacturer tax book and the compensation therefor is provided for by Section 150.340, RSMo 1949, which reads:

> "1. After the equalization has been completed, the county clerk shall extend on the book all proper taxes at the same rate as assessed for the time on real estate, and on or before the first day of November thereafter, he shall make out and deliver to the collector a copy of such book, properly certified, and take the collector's receipt therefor, which receipt shall specify the aggregate amount of each kind of taxes due thereon, and the clerk shall charge the collector with the amount of such taxes.

> "2. The county clerk shall receive as compensation for making the tax book, copy, filing statements, and certifying the same, the sum of six cents for each name or firm, one-half payable by the county, the other by the state. The county assessor shall receive as compensation for his services in taking the statements herein required and entering them in the book the sum of twenty-five cents per statement. The members of the board of equalization shall receive the same per diem for services under sections 150.300 to 150.370 as fixed by law in relation to general property. In counties of the first class and the city of St. Louis the compensation herein provided shall be paid to the county or city treasury and not to the individual."

The first question presented is whether or not county clerks of third and fourth class counties are entitled to charge both the state and the county the fees provided for in Section 150.340, supra. The question is occasioned by the provisions of Section 51.390, RSMo 1949, which reads:

> "The clerk of the county court, in counties of the third and fourth classes, shall charge and collect in all cases every fee accruing to his office by law, except such fees as are chargeable to the county."

Section 51.390 is part of Chapter 51, which contains the general provisions regarding county clerks; Section 150.340 is a special section which provides for the duties of the county clerks with regard to the manufacturer tax book and the compensation provided therefor. While Section 51.390 provides that county clerks of third and fourth class counties shall collect all fees accruing to the office except such as are chargeable to the county, Section 150.340 specifically provides that the county clerk shall receive certain fees for the discharge of his duties with respect to the manufacturer tax book, "one-half payable by the county, the other by the state." We, therefore, find an apparent conflict between these two sections and must resort to the rules of statutory construction to resolve this conflict. The applicable rule to be utilized in this instance to arrive at the legislative intent is stated and

discussed in the case of State ex rel. v. Brown, 68 S.W. (2d) 55, l.c. 59, 334 Mo. 781, as follows:

> "It will be observed that section 4556, except the last proviso which is not pertinent to the matter here in controversy, relates to corporations in general, while section 5613 relates only to a particular class of corporations, to wit, building and loan associations. In such case the rule applicable is that 'where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.' Tevis et al. v. Foley, 325 Mo. 1050, 1054, 30 S.W. (2d) 68, 69; State ex rel. Buchanan County v. Fulks, 296 Mo. 614, 626, 247 S.W. 129; State ex inf. Barrett v. Imhoff, 291 Mo. 603, 617, 238 S.W. 122. If there be any repugnancy between these two statutes, the general statute, section 4556, must yield to the special statute, section 5613."

Therefore, in view of the above, we are of the opinion that county clerks of third and fourth class counties are entitled to charge both the state and the county the fees provided for the discharge of their duties with respect to the manufacturer tax book, as the general provisions of Section 51.390 are not applicable in this instance, the special provision of Section 150.340 prevailing.

The next question to be considered is whether or not the fees provided for by Section 150.340 are accountable fees. To arrive at the legislative intent in this regard, we feel that it becomes necessary to examine the provisions of Section 51.400, RSMo 1949, which reads in part:

> "1. The following fees and compensation shall be allowed to and retained by the clerk of the county court, as unaccountable fees, in addition to the salary and other fees now provided by law, for services rendered:
>
> "(1) For extending the tax on the assessment book, three cents for each name, to be paid by the state and county in proportion to the number of tax columns used by each;
>
> "(2) For making a copy of the tax book for the use of the collector, including certificate and seal to the same, for every hundred words and figures, ten cents, one-half to be paid by the state, the other half by the county; for making an abstract of the assessor's book for the state tax commission, five dollars, and in addition thereto fifty cents for every one hundred thousand dollars' worth of property on such abstract, to be paid by the state;
>
> * * * * * * * * * * * * * *
>
> "2. In all counties of the first and second class and the city of St. Louis all fees and compensation allowed in this section shall be paid into the county or city treasury, as provided by law, by the clerk of the county court who shall have received any such fees and compensation."

We therefore see that the legislature has provided fees for county clerks for their duties with regard to the tax book provided for by the general revenue laws, and has further specifically provided that such fees shall be unaccountable, except in counties of the first and second class and the City of St. Louis. The duties for which such unaccountable fees are provided are similar to those provided for in Section 150.340 regarding the manufacturer tax book. We feel that in this regard Section 51.400 and Section 150.340 relate to the same subject and therefore must be construed together to arrive at the true legislative intent. We find the following regarding the construction of statutes in pari materia in the case of Curators of Central College v. Rose, 182 S.W. (2d) 145, l.c. 150:

> "The rule relied upon is stated as follows: '"All consistent statutes relating to the same subject, and hence briefly called statutes in pari materia, are treated prospectively, and construed together as though they constituted one act. This is true whether the acts relating to the same subject were passed at different dates, separated by long or short intervals, at the same session, or on the same day" Suth. St. Const. § 283. * * *"Where enactments separately made are read in pari materia, they are treated as having formed, in the minds of the enacting body parts of a connected whole, though considered by such a body at different dates, and under distinct and varied aspects of the common subject. Such a principle is in harmony with the actual practice of legislative bodies, and is essential to give unity to the laws and connect them in a symmetrical system. Such statutes are taken together and construed as one system, and the object is to carry into effect the intention. It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions" (Ib., Sec. 288).' Sales v. Barber Asphalt Paving Co., 166 Mo. 671, 677, 66 S.W. 979, 980; State ex rel. Columbia National Bank of Kansas City v. Davis, 314 Mo. 373, loc.cit.388, 284 S.W. 464; 59 C.J. Sec. 620, p. 1042. * * *."

Section 150.340 does not specifically state that the fees provided for therein shall be unaccountable. However, it is logical to assume that such was the intent of the legislature as it was specifically provided that they shall be accountable in counties of the first class and the City of St. Louis. Furthermore, Section 51.400 specifically provides that fees for the discharge of similar duties with respect to the tax book provided for by the general revenue laws shall be unaccountable. These two statutes, which are in pari materia, must be construed together. Therefore, in view of the above, we are of the opinion that it was the intent of the legislature that the fees provided for by Section 150.340 are not accountable by county clerks of third and fourth class counties.

The remaining question presented in your opinion request regards the payment of fees and accountability of same to which county clerks of third and fourth class counties are entitled for the discharge of duties relating to the railroad tax book.

Sections 151.170, 151.180 and 151.190, RSMo 1949, charge the county clerk with the duty of making out the railroad tax book and other duties with regard thereto. Section 151.290, RSMo 1949, then provides that:

> "The county clerk shall be allowed fees at the same rate for making out the railroad tax book as he may receive for like services in making out tax books under the general revenue law of the state."

Section 51.400, RSMo 1949, reads:

> "1. The following fees and compensation shall be allowed to and retained by the clerk of the county court, as unaccountable fees, in addition to the salary and other fees now provided by law, for services rendered:
>
> "(1) For extending the tax on the assessment book, three cents for each name, to be paid by the state and county in proportion to the number of tax columns used by each;
>
> "(2) For making a copy of the tax book for the use of the collector, including certificate and seal to the same, for every hundred words and figures, ten cents, one-half to be paid by the state, the other half by the county; for making an abstract of the assessor's book for the state tax commission, five dollars, and in addition thereto fifty cents for every one hundred thousand dollars' worth of property on such abstract, to be paid by the state;
>
> "(3) For making an abstract of the tax book for the director of revenue, including certificate and seal to same, five dollars, and one-tenth of one per cent of the amount of revenue tax on such abstract, to be paid by the state;

"(4) For certifying statements to the director of revenue, as required by law, or making any certificate required by law, under the seal of said court, seventy-five cents for each certificate and seal, to be paid equally out of the state and county treasury;

"(5) For every settlement with the collector, thirty-five cents, to be paid equally out of the state and county treasury;

"(6) For safekeeping, filing and transmitting the collector's bond to the director of revenue, one dollar;

"(7) For filing, preserving and safekeeping of the assessment lists, one-half of one cent per list, to be paid one-half by the state and one-half by the county.

"2. In all counties of the first and second class and the city of St. Louis all fees and compensation allowed in this section shall be paid into the county or city treasury, as provided by law, by the clerk of the county court who shall have received any such fees and compensation."

Section 151.290, supra, was originally enacted as Section 6896, R. S. Mo. 1879. It has remained unchanged to the present time. At the time of its enactment, the only statute providing for fees to county clerks for the discharge of duties with regard to tax books, was Section 6896, R. S. Mo. 1879, which section was part of the general revenue law. Through the various revisions, this statute remained part of the general revenue law until the 1949 revision when those provisions which relate to county clerks became Section 51.400, RSMo 1949. Section 51.400 remains the provision which provides for the fees to which county clerks are entitled for the discharge of their duties regarding the tax book provided for by the general revenue laws. It is therefore our opinion that the county clerks of third and fourth class counties shall be entitled to such fees for making out the railroad tax book as are provided for in Section 51.400, supra.

Since Section 51.400 specifically provides that the fees provided for therein shall be unaccountable and since Section

Honorable W. H. Holmes

151.290, provides that county clerks shall receive such fees as are provided for like duties in making out tax books under the general revenue laws, it is our opinion that the fees to which county clerks are entitled for the discharge of duties with regard to the railroad tax book are unaccountable.

There remains the question of whether or not the county is liable for the fees to which such county clerks are entitled for making out the railroad tax book.

One half of the fees provided for in Section 51.400, supra, is, in some instances, to be paid by the county. This section must be construed together with Section 51.390, supra. We feel that the same principle applies in this instance as applied to the fees provided for the discharge of duties regarding the manufacturer tax book. Section 51.400, being a special statute prevails over Section 51.390, as this latter statute is a general statute. It is therefore our opinion that the county clerks of third and fourth class counties are entitled to charge both the state and the county for the discharge of duties regarding the railroad tax book.

CONCLUSION

It is therefore the opinion of this department that county clerks of third and fourth class counties are entitled to charge both the state and the county the fees provided for in Section 150.340, RSMo 1949, for the discharge of duties regarding the manufacturer tax book and that such fees are unaccountable.

It is further the opinion of this department that county clerks of third and fourth class counties are entitled to such fees as are provided for in Section 51.400, RSMo 1949, for the discharge of duties regarding the railroad tax book, which fees such county clerks are entitled to charge both the state and the county and such fees are unaccountable.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

OFFICERS:
SALARIES AND FEES:

Prior to enactment of Section 57.430, RSMo 1949, a county court had no statutory authority to pay mileage for travel of a sheriff going beyond boundary of state to return juvenile delinquent to this state. Since enactment of above section, sheriff is allowed maximum of $75.00 in calendar month for performance of official duties in connection with the investigation of persons accused or convicted of a criminal offense.

FILED
41

April 15, 1952

Honorable W. H. Holmes
State Auditor
State of Missouri
Jefferson City, Missouri

4-15-52

Dear Sir:

This office is in receipt of your request for an official opinion, as follows:

"A juvenile, fifteen years of age, was charged with delinquency in the magistrate court of St. Francois County and after the hearing was paroled. While on parole he was staying with a friend near Iron Mountain, Missouri, and stole the friend's pocket book containing $90.00 and left for Detroit, Michigan. He got into some trouble in Michigan and the authorities there, notified the prosecuting attorney of St. Francois County, that they were holding him for the authorities of said county. The authorities of St. Francois County tried to get the juvenile's parents to go get him but they were not interested. The party from whom he stole the pocket book and $90.00 insisted that he be returned to St. Francois County to answer to the crime committed. The sheriff took the matter up with the county court and the court ordered the sheriff to go to Michigan and return the juvenile and they would pay his expenses, which he did. The expense incurred amounted to $151.00, which the court paid.

"The question is:

Honorable W. H. Holmes

"Did the county court have statutory authority to pay the $151.00 to the sheriff?"

One of the essential elements of the question which you ask would appear to be whether or not the county court is vested with authority to make such payment as described in your above request.

Concerning the power of the county court, in the case of Lancaster v. County of Atchison, 180 S.W. (2d) 706, l.c. 708, the Court said:

> "'The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void.' * * *"

Section 7 of Article VI of the Constitution of Missouri, 1945, provides for the management of county business as follows:

> "County courts--number of members--powers and duties.--In each county not framing and adopting its own charter or adopting an alternative form of county government, there shall be elected a county court of three members which shall manage all county business as prescribed by law, and keep an accurate record of its proceedings. The voters of any county may reduce the number of members to one or two as provided by law."

In Section 49.270, RSMo 1949, it is provided as follows:

> "The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

We would conclude from the above that the county court does not possess any powers except those which are conferred by statute. This is brought out in the case of Jensen v. Wilson Township, Gentry County, 145 S.W. (2d) 372, l.c. 374, in which the Court stated:

> "* * * A county court is only the agent of the county with no powers except those granted and limited by law, and like all other agents, it must pursue its authority and act within the scope of its powers. State ex rel. Quincy, etc., Ry. Co. v. Harris, 96 Mo. 29, 8 S.W. 794. * * *"

We have found no statute authorizing the county court to pay the expenses of the sheriff for going without the state to bring back a prisoner. In regard to the statutory authorization to the sheriff, Section 57.390, RSMo 1949, provides for the salary of sheriffs in class three counties. That section is lengthy and we believe it will be sufficient to say that it does not provide for expenses.

There is a provision for the expense in Section 57.430, RSMo 1949. That section provides as follows:

> "In addition to the salary provided in sections 57.390 and 57.400, the county court shall allow the sheriffs and their deputies, payable at the end of each month out of the county treasury, actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed five cents per mile."
>
> (Underlining, ours.)

This section provides for the expenses in the serving of criminal processes. We know of no effective criminal process for the sheriff to serve outside of the State of Missouri that can be issued by our state courts in criminal matters. The facts set forth in the request letter entail none.

House Bill No. 100 of the 66th General Assembly became effective October 9, 1951. It increased the mileage allowance to seven cents per mile. However, this statute, although being amendatory to the above Section 57.430, limits the maximum amount allowed to be $75.00 during any one calendar

month in the performance of official duties in connection with the investigation of persons accused of or convicted of a criminal offense. It does, however, now include these words: "In connection with the investigation of persons accused of or convicted of a criminal offense."

We find no provision in this new law which limits the distance to be traveled by either county or state boundaries. There is a limitation on the amount to be expended in any one calendar month. That is $75.00. From the text of the statute the $75.00 must include all of the expenses in connection with such investigations for one calendar month.

House Bill No. 100, referred to above, provides for the method the sheriff shall use to obtain reimbursement for his expenses. It is as follows:

> "* * * At the end of each month, the sheriff and each deputy shall file with the county court an accurate and itemized statement, in writing, showing in detail the miles traveled by such officer, the date of each trip, the nature of the business engaged in during each trip, and places to and from which he has traveled. Such statement shall be signed by the officer making claim for reimbursement, verified by his affidavit, and filed by him with the county court. Whenever claim for reimbursement is made by a deputy, his statement shall also be approved in writing by the sheriff. The county court shall examine every claim filed for reimbursement, and if found correct, the county shall pay to the officer entitled thereto, the amount found due as mileage."
>
> (Underlining, ours.)

If this allowance was made subsequent to October 9, 1951, for an expenditure subsequent to that time, the county court would still not have authority to grant the full amount. The limitation is $75.00 which covers all of the expenses of investigation for one calendar month.

Honorable W. H. Holmes

CONCLUSION

It is therefore the opinion of this department that the county court did not, prior to the enactment of House Bill No. 100 of the 66th General Assembly, have authority to pay mileage to the sheriff for going beyond the boundaries of the State of Missouri for the purpose of returning a juvenile delinquent to this state. If expense was incurred subsequent to enactment of House Bill No. 100, the court could have included a part of such an expenditure within the $75.00 maximum allowance to the sheriff for investigation, if it found the claim for reimbursement to be correct.

Respectfully submitted,

JAMES W. FARIS
Assistant Attorney General

JWFab

APPROVED:

J. E. TAYLOR
Attorney General

ASSESSORS : County Assessors are entitled to fees provided
: in House Bill No. 392, in addition to other
HOUSE BILL NO.392 : compensation provided by law.

Mimeo 5/28/52 copies available 7-23-52

FILED 41

5-26-52

May 26, 1952

Honorable W. H. Holmes
State Auditor
State Capitol
Jefferson City, Missouri

Dear Mr. Holmes:

We have given careful consideration to your request for an opinion, which request is as follows:

> "Is the county assessor allowed the fee of twenty-five cents provided in Section 150.070 and 150.340 RSMo 1949. in addition to the fee of forty-five cents and six cents provided in Section 150.335 of House Bill Number 392, passed by the Sixty-Sixth General Assembly (making a total of seventy-six cents)? If so, is the assessor entitled to charge for all of said fees for the year 1952?"

House Bill No. 392 was enacted by the 66th General Assembly of Missouri in 1951 and became effective on the 18th day of March, 1952.

This new law is an amendment to Chapter 150, RSMo 1949, which provides ways and means for taxing merchants and manufacturers in the state. Under Section 150.055 of the act the assessor is required, at least once each year before the first Monday in May, to visit and inspect each place of business owned and operated by any merchant within his county, for the purpose of obtaining such information as may be desirable or necessary in facilitating the process of assessing the property of the merchant. Section 150.060 of the new law makes it the duty of the assessor to report such information to the county board of

equalization on the second Monday in July in each year. The assessor is also required by Section 150.325 to visit and inspect each place of business owned and operated by any manufacturer within his county. He is also under duty, as provided in Section 150.330, to report the information thus obtained to the county board of equalization.

Section 150.335 of the new act is as follows:

> "For visiting and inspecting the establishments of each merchant or manufacturer as required by sections 150.055 and 150.325, the county assessor in all counties of classes three and four shall receive a fee of forty-five cents, and for making each report required by sections 150.060 and 150.330 he shall receive a fee of six cents."

It is very evident that the Legislature intended to give the assessor extra compensation for the additional services required of him in connection with his new duties. As a matter of fact, this interpretation of the act is stated in the title of the bill. The new law does not alter the functions or the fees already established for the assessor. It simply adds new duties and provides additional pay for the performance of such service.

The act became effective on the 18th day of March, 1952. The duties imposed by the new law were then incumbent upon the assessor. Although he did not have full time in which to make the required visits and inspections before the first Monday in May of the present year, he should have made diligent effort to complete the work and file his reports as required by law. He is entitled to all fees earned in said service for the year 1952.

There is, however, a constitutional question involved. The Constitution of Missouri, in Section 13 of Article VII, provides that the "compensation of state, county and municipal officers shall not be increased during the term of office." But the Courts of Missouri have sustained the opinion that this injunction does not prohibit an officer from receiving extra pay for additional duties imposed upon him.

In State ex rel. vs. Sheehan, 269 Mo. 421, l.c. 429, the Supreme Court of Missouri said:

Honorable W. H. Holmes

"Another contention made is that since the appellant was an officer at the time of the passage of the act, it is inapplicable to him because the Constitution prohibits any increase in the pay of an officer during his term of office. We think this contention unsound because the act in question enjoins upon such officers as appellant new and additional duties and provides merely a compensation therefor. While in some jurisdictions a constitutional provision such as ours has been held to inhibit even this, in this and many other states the contrary doctrine has been accepted and acted upon. (Cunningham v. Current River Railroad Co., 165 Mo. 270; State ex rel. v. Walker, 97 Mo. 162; State ex rel. v. Ranson, 73 Mo. 89; State ex rel. v. McGovney, 92 Mo. 428; County v. Felts, 104 Cal. 60; State ex rel. v. Board of Commissioners, 23 Mont. 250; State ex rel. v. Carson, 6 Wash. 250; Love, Attorney-General v. Baehr, Treasurer, 47 Cal. 364; Purnell v. Mann, 105 Ky. 87; Lewis v. State ex rel., 21 Ohio C.C. 410.)

"It is our opinion that the act is valid and that the appellant is entitled to the fees demanded and that the respondent was not justified in refusing to audit the account and draw a warrant therefor on the city treasury."

CONCLUSION

It is the opinion of this office (1) that assessors in counties of classes three and four are entitled to the fees provided in Section 150.335 of House Bill No. 392, in addition to other compensation provided in Sections 150.070 and 150.340, RSMo 1949; (2) that the assessor may be entitled to all of said fees for the year 1952.

Respectfully submitted,

APPROVED:

B. A. TAYLOR
Assistant Attorney General

J. E. TAYLOR
Attorney General

BAT:

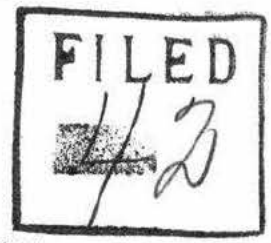
ELECTIONS:
ABSENTEE BALLOTS:

An absentee ballot which is obtained at a time more than thirty days preceding the election at which it is cast may be counted if otherwise in conformity with the absentee voting law.

October 21, 1952

FILED

42



Honorable Robert L. Hoy
Prosecuting Attorney of
Saline County
Marshall, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office which request reads as follows:

> "I am writing to request an opinion on the construction of Section 112.020 relating to the time during which applications may be made for absentee ballots.
>
> "Section 11.471 Revised Statutes 1939 provided as follows:
>
> > 'Any elector . . . expecting to be absent . . . may, not more than thirty no less than five days prior to the date of such election, make application in person or by mail to the County Clerk . . .'
>
> "This section was revised in 1944 and again in 1949 and at present reads as follows:
>
> > 'Any elector . . . expecting to be absent from the county . . . may, within thirty days next before the date of such election and up to six o'clock p.m. on the day before any election make application in person or by mail to the County Clerk . . .'
>
> "Please inform me if an absentee ballot for which application was filed with the County Clerk on a

> date prior to thirty days preceding the primary election set for August 5, 1952 is a valid ballot and may be counted by those charged with the responsibility of canvassing the absentee ballots."

Section 112.020, RSMo 1949, to which you referred provides in part as follows:

> "Any elector is defined in the foregoing section expecting to be absent from the county of his residence on the day of such election, or expecting to be prevented through illness or physical disability from personally going to the polls to vote on election day, and who shall attach to his application a certificate of illness or disability attested to by a licensed physician or duly accredited practioner of Christian Science may, within thirty days next before the date of such election and up to six o'clock p.m. on the day before any election, make application in person, or by mail, to the county clerk, or where existing, to the board of election commissioners, or other officer or officers charged with the duty of furnishing ballots for such election in his voting precinct, for an official ballot for said precinct, to be voted at such election. * * *"

No provision is made that an absentee ballot obtained other than in the exact manner prescribed in the above section shall be voted, nor is there any provision to the effect that failure to comply with the requirements regarding the time in which an application for an absentee ballot is submitted or obtained shall effect the validity of the ballot.

Rules for the construction of election laws were laid down by the Supreme Court in the case of Nance v. Kearbey, 251 Mo. 374, l.c. 383. The court in that case stated:

> "First: Election laws must be liberally construed in aid of the right of suffrage. (State ex rel. v. Hough, 193 Mo. l.c. 651; Hale v. Stimson, 198 Mo. 134.) The whole tendency of American authority is towards liberality to the end of sustaining the honest choice of electors. (Stackpole v. Hallahan, 16 Mont. 40.) The choice of electors must be judicially respected, unless their voice is made to speak a lie, or a result radically vicious,

because of a disregard of mandatory statutory safeguards.

"Second: The uppermost question in applying statutory regulation to determine the legality of votes case and counted is whether or not the statute itself makes a specified irregularity fatal. If so, courts enforce it to the letter. If not, courts will not be astute to make it fatal by judicial construction. (Gass v. Evans, 244 Mo. l.c. 353; Hehl v. Guion, 155 Mo. 76.) 'Such a construction' (says this court, speaking through Barclay, J., in Bowers v. Smith, 111 Mo. l.c. 55) 'of a law as would permit the disfranchisement of large bodies of voters, because of an error of a single official should never be adopted where the language in question is fairly susceptible of any other. (Wells v. Stanforth (1885), 16 Q.B. Div. 245.)' Again (pp. 61-2): 'If the Law itself declares a specified irregularity to be fatal, the courts will follow that command irrespective of their views of the importance of the requirement. (Ledbetter v. Hall (1876), 62 Mo. 422.) In the absence of such declaration, the judiciary endeavors as best they may to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a free and full expression of the popular will. If it had, the irregularity is held to vitiate the entire return; otherwise it is considered immaterial."

In view of the absence of any statutory declaration that the irregularities referred to by you are fatal, we feel that under the rules above prescribed, the matter referred to in your opinion request should not render invalid an absentee ballot properly mailed by a person legally entitled to cast such absentee ballot.

CONCLUSION

Therefore, it is the opinion of this office that an absentee ballot cast by a person legally entitled to vote the same may be counted although such ballot may have been obtained more than thirty days prior to the election, Section 112.020, RSMo 1949, relating to time of application being directory only.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CIRCUIT CLERKS- - - -)
)
Deputies and Assistants.)
)
)

Under the provisions of Section 483.345, RSMO 1949, Clerks of Circuit Courts in class three counties in this State may discharge any deputy or assistant at any time.

January 2, 1952

1-3-52

FILED
43

Honorable William L. Hungate
Prosecuting Attorney
Lincoln County
Troy, Missouri

Dear Mr. Hungate:

This will be the opinion you requested from this Department on the question whether the Circuit Clerk and Ex-Officio Recorder of Deeds of Lincoln County has the power to discharge a Deputy Circuit Clerk prior to the expiration of the present term of office of the Circuit Clerk, in view of the record made by the Circuit Court of Lincoln County on December 20, 1950, approving the appointment of said Deputy Circuit Clerk and fixing the period of his employment. Your letter requesting this opinion reads as follows:

> "The Deputy Circuit Clerk of Lincoln County has contacted me concerning a problem and I would appreciate the opinion of the Attorney General's Office on this matter.
>
> "The following is an excerpt from the Circuit Court Record of Lincoln County, Missouri, dated the Twentieth day of December, 1950.
>
> "'Court convenes with Judge B. Richards Creech presiding.'
>
> "##########(Court 1st approved the bond of J.V. Whiteside as Circuit Clerk.) ###
>
> "'IN RE: DEPUTY CIRCUIT CLERK & EX-OFFICIO RECORDER OF DEEDS.'

Honorable William L. Hungate

"'Now on this day comes J.V. Whiteside, Circuit Clerk Elect and files and presents to the Court his appointment of Deputies to the Office of Circuit Clerk and Ex-Officio Recorder of Deeds.'

"'STATE OF MISSOURI,) SS.
"'COUNTY OF LINCOLN,)

"TO THE HONORABLE B. RICHARDS CREECH, JUDGE OF THE CIRCUIT COURT OF LINCOLN COUNTY, MISSOURI.

"Comes now J.V. Whiteside, duly elected Circuit Clerk and Ex-Officio Recorder of Deeds of Lincoln County Missouri, and informs the Honorable B. Richards Creech, Judge of said Court, that he has appointed Wyatt Rinaman as Deputy Circuit Clerk and Deputy Ex-Officio Recorder of Deeds of Lincoln County, Missouri, to assist him in the prompt and proper discharge of the duties of said office of Circuit Clerk and Ex-Officio Recorder of Deeds of said County, which appointment shall be in affect from January 1, 1951, and is to continue until the expiration of the present term of office of the said J.V. Whiteside as Clerk of the Circuit Court and Ex-Officio Recorder of Deeds.

"WHEREFORE, said J.V. Whiteside, Clerk as aforesaid, requests the Honorable Circuit Judge aforesaid, to approve the appointment of said Deputy Clerk and Deputy Recorder of Deeds and to fix the amount of compensation to bepaid said Wyatt Rinaman as such Deputy Clerk and such Deputy Recorder of Deeds, and to fix the amount of official bond to be required of said Deputy Clerk.

"Respectfully submitted

"J.V. WHITESIDE
"Clerk of the Circuit Court

"It is now ordered by B. Richards Creech,

Judge of the Circuit Court of Lincoln County, Missouri, that the foregoing appointment of Wyatt Rinaman as Deputy Clerk of said Circuit Court and Deputy Ex-Officio Recorder of Deeds of Lincoln County, Missouri, be and the same is hereby approved. The compensation to be paid to said Deputy Clerk and Deputy Recorder of Deeds is fixed at the sum of $170.00 per month during the period of said appointment. It is further ordered that said Deputy Clerk and Deputy Recorder of Deeds execute Official Bond in the sum of $2,000.00, to be approved by the undersigned Judge of said Circuit Court.

"It is further ordered that the above appointment and approval thereof be entered upon the record of said Circuit Court, and that a certified copy thereof be delivered to and filed with the Clerk of the County Court of Lincoln County, Missouri.

"Dated this 20th day of December, 1950.

"B. Richards Creech
"Judge of the Circuit Court
"Lincoln County, Missouri."

"#####(Following is the oath of office of the Deputy in proper form.) ###

"Now the question is whether or not the Circuit Clerk and Ex-Officio Recorder of Deeds, J.V. Whiteside, has the power, in view of the above record, to dismiss the Deputy Circuit Clerk from his position prior to the expiration of the Circuit Clerk's present term of office.

"We would appreciate an answer at your first convenience as the dismissal is scheduled for January 1st, 1952. Thanks for your assistance."

Honorable William L. Hungate

Lincoln County, Missouri, according to the records of the Secretary of State, as appears in the "Roster of State, District and County Officers of the State of Missouri 1952-1952" issued by him, has an assessed valuation of $16,611,388.

Section 28.020, RSMo 1949, provides that all counties in this State now having or which may hereafter have an assessed valuation of Ten Million Dollars and less than Fifty Million Dollars shall be in the third class of counties of this State. Lincoln County is, therefore, a county of the third class.

Section ~~384~~ 483.015, RSMo 1949, provides that beginning with the year 1882 and each four years thereafter clerks of all Courts of Record, except clerks of the Supreme Court, the Courts of Appeals, Probate Courts and Magistrate Courts, and except as otherwise provided, shall be elected every four years. The Circuit Clerk of Lincoln County was elected under the provisions of said section at the General Election in said county on November 7, 1950, for a period of four years next ensuing after January 1, 1951, and until his successor shall be duly elected and qualified.

Section 483.345, RSMo 1949, authorizing the appointment of deputies and assistants by the Circuit Clerk in counties of the third class with the approval of the Judge of the Circuit Court of such county, reads as follows:

> "Every circuit clerk in counties of the third class shall be entitled to such number of deputies and assistants to be appointed by such official, with the approval of the judge of the circuit court, as such judge shall deem necessary for the prompt and proper discharge of the duties of his office. The judge of the circuit court, in his order permitting the circuit clerk to appoint deputies or assistants, shall fix the compensation of such deputies or assistants which order shall designate the period of time such deputies or assistants may be employed. Every such order shall be entered on record, and a certified copy thereof shall be filed in the office of the county clerk. The circuit clerk may, at any time, discharge any deputy or assistant, and may

> regulate the time of his or her employment and the circuit court may at any time modify or rescind its order permitting an appointment to be made."

It is assumed that the Judge of the Circuit Court in determining the number of Deputies and Assistants to be appointed would act in such matters only upon the application and recommendation of the Circuit Clerk. This was the case here, as is shown by the record entries made by the Circuit Court in approving the appointment, fixing the compensation and the amount of the official bond of said Deputy Clerk.

There is nothing in the record recited in your letter which could prevent the Circuit Clerk from discharging the named Deputy at any time after the approval and the taking effect of the appointment. It will be noted from the excerpts of the Circuit Court record that the Court did not actually designate the period of time the named Deputy Circuit Clerk should be employed. The Court approved the appointment of the Deputy as made by the Circuit Clerk but the record is silent as to the period of time he should be employed. The fact that the Circuit Clerk advised the Court in the application that he, the Clerk, had appointed the Deputy for a period beginning and ending with the term of the Clerk's tenure in office and the fact that the Court did approve the appointment of the Deputy, taken singly or combined, do not constitute an order by the Court designating "the period of time such deputy may be employed" as is required to be ordered under the terms of said Section 483.345. But if the Court had made an order to that effect we believe it would be ineffective, as we will endeavor to point out in this opinion.

The General Assembly of this State is our only authority, outside of the Constitution, for prescribing tenure of office. In providing for the election of Circuit Clerks the Legislature in said Section 483.015 fixed the Clerk's tenure of office at four years.

Section 483.345 authorizes the Circuit Clerk to appoint Deputies and Assistants, with the approval of the Circuit Court and to discharge Deputies and Assistants at any time. The Circuit Judge or Circuit Court has no authority to appoint or discharge a Deputy or an Assistant of the Circuit Clerk. The Judge is authorized by the statute to approve or disapprove the action of the Circuit Clerk

in making such appointments, but the power to discharge is given by the statute to the Circuit Clerk alone. The Court may modify or rescind its order permitting appointments of Deputies and Assistants to be made, even while the Deputy or Assistant is acting under such appointment and actually employed. With the entry of record of either of those two authorized orders the authority of the Judge of the Circuit Court or the Circuit Court itself in such procedure is thereby ended.

Conceding that the letter of the statute does give the Circuit Judge or Circuit Court the authority by order to "designate the period of time such deputies or assistants may be employed" such power is immediately in the same section rendered unavailing and ineffective by giving the Circuit Clerk the absolute power to discharge any Deputy or Assistant at any time.

This statute, Section 483.345, RSMo 1949, was originally enacted, Laws of Missouri, 1915, page 378, l.c. 379, paragraph 2, as a new section. The section has been retained in succeeding revisions, including the revision of 1949. There have been many amendments to the section since its enactment. It would require the lengthening of this opinion beyond its needs to even list the number of amendments made to this section in the separate Session Acts and Revised Statutes of this State to identify all of them by volume and page. The amendments have been restricted almost entirely to providing who or what Court may determine the number of Deputies or Assistants to be employed by the Circuit Clerk, fix their respective salaries, and the length of the periods of their respective employments. These amendments have, at different times, given such authority to the Circuit Court, the County Court, and the Circuit Clerk, and have transferred such authority back and forth amongst them as each Legislature thought proper. Such authority is now, as stated, lodged in the Circuit Judge or Circuit Court as provided in said Section 483.345, but each statute down to and including our present revision, has vested the power to discharge such Deputies and Assistants exclusively in the Circuit Clerk himself, and he may so act at any time.

This section from the beginning was primarily concerned with the question of fixing and supervising compensation to be paid Deputies and Assistants in the office of Circuit Clerk. This section was never intended to be, never was, and is not now,

a statute empowering the County Court or the Circuit Court to fix or determine the tenure of office as such of any public official nor to determine the period of employment of such employees merely as a matter of holding office. The several statutes as amended and the existing statute in its present form have used the term "employment" when referring to the period of services of Deputies and Assistants of the Circuit Clerk.

The only public value, as we view it, the exercise of the power to determine the period of employment of such Deputies or Assistants could reasonably have would be to assist in the economies sought to be accomplished in county finances, by controlling the number of Deputies and Assistants to be employed by the Circuit Clerk and their compensation.

The county budget as fixed by the County Court in third class counties must have as nearly a correct estimate and statement as possible of the expenses anticipated for payment out of county funds to the Circuit Clerk and Deputies and Assistants and Deputy Ex-Officio Recorders of Deeds in such counties, where the Circuit Clerks and the office of the Recorder of Deeds are combined, and, thus it will be necessary for the Circuit Clerk to know and state the number of Deputies and Assistants to be authorized by the Circuit Court to be employed by him and their compensation in order to complete the budget and fully comply with the county budget law. Im this sense and for these purposes, we believe, Section 483.345 is to be considered only as an aid to the Budget Law and has nothing to do, otherwise, with the question of how long such Deputies or Assistants may be employed, or, whether they may be retained at all, by the Circuit Clerk. This question was involved in and was considered in the Court's decision in the case of State ex rel. Hill vs. Thatcher, Judge, et al., 94 S.W. (2d) 1053. The issue in the case, as recited in the opinion, was whether the Circuit Clerk had the authority to appoint a Deputy and fix her compensation with the approval of the Circuit Court, or whether the approval of her appointment and the fixing of her compensation should be by the County Court. The St. Louis Court of Appeals in that case held that the then existing County Budget Law required an estimate of the expenses of the Circuit Clerk to be submitted for the budget, outlining the compensation to be

paid to Deputies and Assistants for that year, and which expenses would have to be paid out of county revenues, but that it was the duty of the County Court to approve the appointment and fix such compensation.

Analogous to and as applicable to the question here being considered, on the question that Section 483.345 is principally concerned with the question of compensation of such subordinates under the Budget Law, the Court, l.c. 1055, 1056, said:

> "* * * In our view the estimate for the salary of any assistant clerk of the circuit court falls in the same category, since it is specifically provided under section 11812, Laws of Mo. 1933, that every clerk of a circuit court shall be entitled to such number of deputies and assistants, to be appointed by such officer, with the approval of the county court, and that the county court in its order permitting the clerk to appoint such deputies and assistants 'shall fix the compensation of such deputy or assistant * * * and the county court may, at any time, modify or rescind its order permitting any appointment to be made, and may reduce the compensation theretofore fixed by it.' Certainly, in light of this specific statute, where the county court shall have, in conformity therewith, approved of an appointment of a deputy or assistant of a circuit clerk and has fixed the compensation of such deputy or assistant, the estimate of expenditures submitted by the circuit court and the clerk of the circuit court to the budget officer under the Budget Law must designate therein that amount so fixed by the county court.
>
> "In this connection we call attention to the fact that when the Legislature in 1933 repealed the then existing section 11812, Rev. St. of Mo. 1929 (Mo. St. Ann. Sec. 11812, p. 7031), and enacted

> a new section of the statute under the same number, a comparison of the new with the old section will disclose that the only change accomplished was to take the approval of the selection of deputies and assistants of the clerk of the circuit court and the fixing of the compensation of such deputies and assistant clerks from the circuit court and place it in the hands of the county court.
>
> "We are clear in our view, and so hold, that under the existing statutes the approval of the appointment and the fixing of the compensation for deputies and assistants of the clerk of the circuit court of St. Louis county lies with the county court, and that this view is in keeping with the ruling of our Supreme Court in the Graves Case, supra, and does not violate the provisions of section 18 of the Budget Act."

We believe the above-cited case supports our view that said Section 483.345 is concerned only with the question of compensation to be paid Deputies and Assistants of the Circuit Clerk as elements of the procedure in fixing the county budget and has no part or office to perform on the question of fixing the period of time, as such, that such Deputies and Assistants may be employed. We believe that the provision in said section authorizing the Circuit Judge or Circuit Court to designate in his order permitting the Circuit Clerk to appoint Deputies and Assistants and fix their compensation and also to designate the period of time such Deputies or Assistants may be employed means that if the Clerk needed Deputies or Assistants he would make such fact known to the Judge or the Circuit Court and would advise the Judge or the Court that he had employed such Deputies or Assistants then and with that knowledge the Court may, in the order approving such appointments, designate the period of such employments. But even so, the Circuit Clerk may, under the statute, discharge a Deputy or an Assistant at any time.

The case of State ex inf. Barrett, Attorney General, vs. Hedrick, 294 Mo. 21, was before the Supreme Court of this

State on the question of the right of the Governor to discharge the State Warehouse Commissioner where the statute authorizing the appointment of such official by the Governor did not fix his tenure of office.

The question in that case was, of course, one of construction of the right of the appointing power to remove an appointee where nothing else but the power to appoint was conferred upon the appointing officer. In the question we are considering here said Section 483.345 does provide the express power for the Circuit Clerk to remove Deputies or Assistants at any time.

The Court in the Hedrick case, supra, took note of the distinction to be made between a case where there was no authority to discharge conferred but the right to discharge may be implied and a case where the statute does give express authority to the appointing officer to discharge his appointees. The Court made this distinction clear, and plainly stated the rule that where the power to discharge is expressly conferred by the statute there is nothing to construe, and that where express power to discharge is conferred upon the appointing officer by statute there is then an end to all controversy on such question. The Court in its opinion on this point, l.c. 65, said:

> "It thus appears that when the Legislature provides for the appointment of one official by another, if it does nothing more, adopts no means to forestall it, the act authorizing the appointment will inevitably raise the power to remove at pleasure. This power is none the less a part of the act, and none the less within the title because it arises by construction. It is clear that if it is not germane it could not arise out of the power to appoint, because the constitutional provision in that case would invalidate it. It is also clear that the rule itself could not exist except the power arose out of the simple conferring of the power to appoint, since express language authorizing removal at pleasure would leave no reason or ground for implying the power." (Emphasis ours.)

Honorable William L. Hungate

The express power given to the Circuit Clerk to discharge his Deputies or Assistants at any time, regardless of any other language or provision in said section, is, we believe, absolute and is not to be denied.

CONCLUSION.

It is, therefore, the opinion of this Department, considering the above authorities, and particularly the terms of Section 483.345, RSMo 1949, that Clerks of the Circuit Courts in Missouri have the express authority to discharge Deputy Circuit Clerks and Assistants and Deputy Ex-Officio Recorders of Deeds employed in their offices at any time, and that the record in the instant case made by the Circuit Court of Lincoln County, Missouri approving the appointment of the named Deputy Circuit Clerk contains nothing to prevent the Clerk from discharging such Deputy.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J.E. TAYLOR
Attorney General

GWC:ir

BANKS, DEPOSITARIES) A depositary of county funds may be required to give
) security for only such funds as are in excess of ten
OF PUBLIC FUNDS:) thousand dollars where the depositary is insured by the
) Federal Deposit Insurance Corporation.

FILED
43

April 7, 1952

4-8-52

Mr. William L. Hungate
Prosecuting Attorney
Lincoln County
Troy, Missouri

Dear Mr. Hungate:

We have given careful consideration to your request for an opinion, which request is as follows:

> "Ten thousand dollars of the county funds is deposited with each of three county depositaries in Lincoln County, Missouri. (There are three other depositaries in the county that handle the balance of the county funds.) Pursuant to Section 110.020 RSMo 1949 these depositaries, insured by the F.D.I.C., have put up $5000.00 security. Now that the F.D.I.C. has increased its insurance from five to ten thousand dollars these three depositaries are beseeching the County Court to permit them to withdraw the $5000.00 security since the F.D.I.C. insures the full $10,000.00 of public funds deposited with each of them. The Court is willing to comply with their request unless the provisions of Section 110.020 prohibit compliance.
>
> "Please advise me if the County Court would be justified in permitting these depositaries to give security for only such county funds as are in excess of $10,000.00."

The law governing this question is contained in Sections 362.490 and 110.020, RSMo 1949.

Section 362.490 is as follows:

> "Notwithstanding any provision of law of this state or of any political subdivision thereof requiring security for deposits in the form of collateral, surety bond or in any other form, security for such deposits shall not be required to the extent said deposits are insured under the provisions of an act of congress creating and establishing the Federal Deposit Insurance Corporation or similar agency created and established by the congress of the United States."

Section 110.020 is as follows:

> "The value of the securities deposited and maintained by a legal depositary under section 110.010, shall at all times be not less than one hundred per cent of the actual amount of the funds on deposit with said depositary, less five thousand dollars where the depositary is insured by the Federal Deposit Insurance Corporation."

These two statutes appear to be in conflict, inasmuch as Section 110.020 seems to limit the security of the Federal Deposit Insurance Corporation to a credit of five thousand dollars. We find it necessary, therefore, to examine some of the rules of law pertaining to the question of statutory construction.

The Supreme Court of Missouri in Dysart v. City of St. Louis, 11 S.W. (2d) 1045, l.c. 1050, said:

> "It is the duty of the court, in construing statutes which appear to be in conflict, to reconcile them, if possible, with the general legislative purpose. * * *"

The same high court in Cummins v. Kansas City Public Service Company, 334 Mo. 672, l.c. 684, said:

> "* * * The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature honestly and faithfully, its plain and rational meaning and to promote its object, and 'the manifest purpose of the statute, considered historically,' is properly given consideration. /See Grier and Meyering cases; 2 Lewis-Sutherland on Stat. Const. (2 Ed.), sec. 363; Endlich on Interpretation of Statutes, sec. 329; and Maxwell on Statutes (5 Ed.) 425./"

Using these principles as a guide, we may examine the two sections quoted above to determine whether or not there is really any conflict between the two. Section 362.490 was enacted as an amendment to the banking laws in 1935. Laws 1935, p. 372. This statute simply means that security for deposits of public funds shall not be required to the extent that said deposits are insured by the Federal Deposit Insurance Corporation.

Section 110.020 was Section 2 of an act passed by the legislature in 1937, relating to depositaries of public funds and the securities required for the safekeeping thereof. Laws 1937, p. 502. The purpose of this section is to require a depositary to give and maintain security of not less than one hundred per cent of the actual amount of the funds on deposit with said depositary. It was not the intent of the legislature to repeal any part of the act of 1935. On the contrary, it was intended to make the act of 1937 conform with the enactment of 1935. The words "five thousand dollars" were written into the law because at that time deposits could not be insured for more than that amount under the act of Congress establishing the Federal Deposit Insurance Corporation. But the federal law has been changed, and deposits are now insured up to ten thousand dollars. Pub. Law 797, Ch. 967, 64 U.S. Stat. at Large. The words "five thousand dollars" in Section 110.020 now have no meaning, for the public funds may be protected up to ten thousand dollars without deposit of securities as collateral. This is the purpose of the law, and nothing else is required.

Mr. William L. Hungate

CONCLUSION

It is the opinion of this office that the county court may require a depositary of the county funds to give security for only such funds as are in excess of ten thousand dollars where the depositary is insured by the Federal Deposit Insurance Corporation.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

BAT/fwh

SHERIFFS.

Boarding and Feeding Prisoners;

1) The Sheriff must furnish wholesome food to prisoners in jail. 2) A county should furnish equipment therefor. 3) If the county has no such equipment it may lease equipment from the Sheriff for such purpose by contract for a reasonable sum to be included in the actual cost of feeding prisoners. 4) The Sheriff must make a sworn statement each month of such actual cost. 5) The County Court must audit same to arrive at what such actual and necessary cost amounts to and then draw a warrant on the county treasury, payable to the Sheriff for such actual and necessary cost. 6) The Sheriff cannot lawfully employ a relative within the fourth degree of consanguinity or affinity to prepare meals for prisoners, or fo any other purpose, and charge the county therefor, but may accept services of a member of his family without cost to the county.

FILED
45

March 10, 1952

Honorable D. B. Jennings
Prosecuting Attorney
Montgomery County
Montgomery City, Missouri

3-11-52

Dear Mr. Jennings:

This is the opinion you requested from this Department respecting the procedure to be followed by the Sheriff in furnishing board and food to prisoners in the county jail of your county. Your letter in detail, submitting numerous questions to be considered, reads as follows:

> "The County Court and the Sheriff of this County have requested that I obtain an opinion from you regarding the cost of boarding and feeding prisoners lodged in the County Jail in accordance with Chapter 221 in the Revised Statutes of Missouri for 1949. Section 221.090 provides that the Sheriff shall submit a statement supported by his affidavit of the actual costs incurred by him in the boarding of prisoners.
>
> "As to what constitutes actual costs, the County Court and the Sheriff have not been able to agree. Under the arrangements in this County heretofore, the County Court has not furnished any equipment for the preparing of meals or the serving of same, nor have they provided any equipment for the keeping of prepared or unprepared food. In the past, our Sheriffs, because of this fact, have used their own personal equipment

> and the Sheriff's wife, or some member of his family would prepare the meals. Request an opinion as to whether or not the County Court, under the Statutes, are required to furnish the necessary equipment for keeping, preparing, and serving the foodstuff to prisoners.
>
> "In determining the cost of food furnished to prisoners, if the Sheriff furnishes the necessary equipment and some member of his family prepares the meals, should a reasonable allowance for the use of said equipment and the labor in the preparation of meals be considered as a part of the costs? If the Sheriff has no member of his family physically able to prepare said meals would he be authorized to hire someone to do this work and include that amount in the costs of meals furnished the inmates of the Jail?
>
> "I would appreciate an answer to these requests as soon as possible for the reason that at the present time, our County Court and Sheriff have been unable to reach an agreement on the payment of the costs for feeding the prisoners."

Montgomery County, Missouri, is a county of the third class.

The provisions of our statutes governing the boarding and feeding of prisoners when confined in the county jail of a county of the third class are found in Section 221.090, Chapter 221, RSMo 1949. Sub-section 1 of said Section 221.090 prescribing what the Sheriff shall do respecting the boarding and feeding of prisoners confined in the county jail of such county reads as follows:

> "Boarding of prisoners--expense, how paid, (class three and four counties).--1. In each county of the third or fourth class, the sheriff shall furnish wholesome food to each prisoner confined in the county jail. At the end of each month, he shall submit to the county court a statement

> supported by his affidavit, of the actual cost incurred by him in the boarding of prisoners, together with the names of the prisoners, and the number of days each spent in jail. The county court shall audit the statement and draw a warrant on the county treasury payable to the sheriff for the actual and necessary cost."

The statutes of this State prior to the enactment of said Sub-section 1 of Section 221.090, have provided that the County Courts of the counties of the State should fix the maximum price to which the Sheriff was entitled per day for the boarding and feeding of each of such prisoners.

The Legislature, naming both third and fourth class counties to be affected, Laws of Missouri, 1949, page 571, enacted the present law governing this question, and now appearing, as hereinabove noted, as Section 221.090, RSMo 1949.

Sub-section 1 of said Section 221.090, as will be readily observed, in its purpose and effect, relieves the County Courts of the several counties of any duty or authority to fix the sum to be allowed the Sheriff for furnishing board and food to prisoners and imposes that express and exclusive duty upon the Sheriff.

Said Sub-section 1 also provides that, at the end of each month, the Sheriff shall submit to the County Court a statement supported by his affidavit of the actual cost incurred by him in the boarding of such persons, together with the names of said prisoners and the number of days each spent in jail.

The duty imposed by said Sub-section 1 upon the County Court respecting the subject is that the Court shall audit the statement of the Sheriff to check the accounts and vouchers submitted each month by the Sheriff to determine what such necessary and actual cost is for furnishing board and meals to prisoners and draw a warrant on the county treasury, payable to the Sheriff, for the actual and necessary cost involved in furnishing wholesome food to such prisoners.

Honorable D. R. Jennings:

The statute requires the Sheriff to furnish wholesome food to each prisoner confined in the county jail. Webster's New International Dictionary, Second Edition, page 2922, defines "wholesome" in definition 2 as: "Promoting physical well-being; beneficial to the health or the preservation of health; * * * ." The language of the statute makes no further reference to the character of food to be served such prisoners. Thus, it is left to the reasonable judgment of the Sheriff as to the items and character of the food to be purchased, to be kept on hand, to be cared for in such manner that the food will remain wholesome, and be so furnished to such prisoners. This, we believe, would necessarily require proper equipment reasonably adequate for preparing meals and the proper and safe-keeping of such foods, prepared or unprepared. The Sheriff is not required by law to furnish equipment for the upkeep of the county jail, or take from his own pocket funds to purchase equipment for the furnishings used in the maintenance of the county jail. The cases are numerous where our Appellate Courts have had such matters before them and have consistently held that it is the duty of the county to provide all county officers with proper furnishings, proper equipment and necessary means to maintain and carry out the duties of their respective offices. Where the statute has made no provision for compensation to be paid to such officers for furnishing such services or equipment, the county must pay for the same or reimburse a county officer when he has used his own funds for such purposes.

In Ewing vs. Vernon County, 216 Mo. 681, a suit was filed by the Recorder against the county for the recovery of postage expended by the Recorder over a period of four years one and one-half months. The Court held that the Recorder was entitled to be reimbursed for this postage and allowed recovery for the full period. The Court said, l.c. 695:

> "* * * 'Where,' * * * 'the law requires an officer to do what necessitates an expenditure of money for which no provision is made, he may pay therefor and have the amount allowed him. * * * Thus it is customary to allow officers expenses of fuel, clerk hire, stationery, lights, and other office accessories.'"

In the case of Boone County vs. Todd, 3 Mo. 140, (Reprint page 80), it appears that Todd, the Circuit Clerk

of Boone County, furnished a house in which to maintain his office, for several years. Todd presented his account to the Circuit Court for allowance. That Court allowed him compensation as rent for his house and ordered the County Court to pay Todd. The County Court refused, and mandamus ensued. Upon an appeal, the Supreme Court held that the County should pay Todd for rent for the use of his house as an office. The Court, l.c. 113 (Reprint page 82), in so holding, said:

> "* * * It is made the duty of the County Court, therefore, to provide houses for the public offices belonging to the counties, and until this is done, the county has no right to throw this burthen on the clerk; but should pay rent unless some equivalent is given to the clerk for the use of his house. * * * ."

Numerous other cases of like character have been so decided by our Appellate Courts, with like results.

It would necessarily, we believe, be a part of the furnishing of board and meals to prisoners confined in the county jail for the Sheriff to employ some person to prepare and serve their meals to the prisoners if he has no person upon whom he can depend without pay to perform such services.

You inquire in your letter if service by a member of the Sheriff's family in the preparation and serving of meals may be included as a part of the costs of furnishing board and meals to such prisoners.

If the Sheriff has a member of his family able and willing to prepare and serve the meals for prisoners, without charge, he may, of course, take advantage of that assistance, but he cannot lawfully employ any member of his family for such services or employment, nor may he bargain with the County Court to include the services of any member of his family as a part of the cost of preparing, cooking or serving meals for prisoners and include such services in the cost of food and board furnished inmates of the jail.

Section 6 of Article VII of the present Constitution of this State states:

Honorable [illegible]. [illegible]. Jennings:

> "Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

This is the nepotism provision of our Constitution.

The case of State ex inf. Norman, Prosecuting Attorney vs. Ellis, 28 S.W. (2d) 363, was before our Supreme Court on quo warranto to oust a Circuit Clerk of a county in this State for violation of our nepotism section of the Constitution because he had appointed his wife as his deputy clerk. Ouster of the Circuit Clerk for such offense was ordered by the Supreme Court. The Court held that a wife is within the prohibited degree of affinity in her marital relation to her husband prohibited by the Constitution. The Court so holding, l.c. 367, said:

> "* * * She is related to him by affinity by reason of the engagement before the marriage, and that relationship of affinity continues after the marriage. The absurd fiction that he could not be related to her but is related to her blood kin by marriage disappears entirely."

We, therefore, believe it would be unlawful for the Sheriff to appropriate the services of any relative within the prohibited degree of relationship, either by consanguinity or affinity, including a member of his family, to prepare and serve meals to prisoners as a part of the cost of boarding and feeding prisoners and include any sum in his statement therefor to the County Court of the cost of furnishing such board and food to such prisoners. This would clearly be an employment prohibited by the section of the Constitution quoted.

We believe it would be proper and lawful for the County Court and the Sheriff to contract for the Court to pay a reasonable fixed sum to the Sheriff for the renting and leasing of any equipment he may own and which he necessarily uses in performing the duty of boarding and feeding prisoners. Section 49.270, RSMo 1949, states, in part, as follows:

Honorable W. . Jennings:

> "The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; * * * ."

It would appear plain that the Court, so having the right to lease any property, real or personal, for the benefit of the County, the County Court could enter into such a contract with the Sheriff if it chose not to furnish the necessary equipment for the performance of such duties by the Sheriff. Such contract, however, must be ordered of record and be executed by the Court and the Sheriff in proper and conventional form. Section 432.070, RSMo 1949, reads as follows:

> "No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

The leasing or renting of property by a County Court for the benefit of a county under the authority of said Section 49.270, supra, has been approved by decisions of our Supreme Court. The case of Ebert vs. Jackson County was before the Supreme Court of Missouri, reported in 70 S.W. (2d) 918. The facts were that the County Court rented or leased a room for a courtroom and office for a Justice of the Peace. The Supreme Court held the contract valid as an implied power under Section 2078, R.S. Mo. 1929. The section there construed is our present Section 49.270, supra. Said section then, as now, read, in this particular, as follows:

> "* * * Furthermore, it is also provided as follows: 'The said court shall have

> control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county. * * * ' Section 2078, R.S. 1929 (Mo. St. Ann. Sec. 2078, p. 2658)."

The construction of the same section, Mag. Stat. 441, Sec. 9, now Section 49.270, was earlier before the Supreme Court in the case of Walker vs. Linn County, 72 Mo. 650. Of the Court's authority to lease property for the benefit of the county and caring for the county property the Supreme Court, l.c. 654, said:

> "The duty devolved upon county courts in the foregoing sections of taking such measures as shall be necessary to preserve all buildings and property belonging to a county carries with it the power to bind the county in a contract which, in the exercise of the judgment of the court, may seem to be necessary to consummate the object for which the duty was imposed, and which, in point of fact, tends directly to consummate the object. * * * ."

Section 49.310, RSMo 1949, requires the County Court of each county of this State, mentioning courthouses and jails, to "acquire a site, construct, reconstruct, remodel, repair, maintain and equip said courthouse and jail * * * ."

Section 221.020, RSMo 1949, reads as follows:

> "The sheriff of each county in this state shall have the custody, rule, keeping and charge of the jail within his county, and of all the prisoners in such jail, and may appoint a jailer under him, for whose conduct he shall be responsible."

We have observed from the decisions cited, excerpts from which are hereinabove quoted, that counties of this State must equip the offices of each county for carrying on the business of any such office. This includes Sheriffs' offices in all counties of the State. (Harkreader vs. Vernon County, 216 Mo. 696).

Honorable D. R. Jennings:

We believe a contract made between the County Court with the Sheriff of any county for the leasing and use of equipment owned by the Sheriff for said purposes, and the leasing contract charge to be paid by the county, would not be invalid as against public policy. 15 C.J., page 517, on this subject, states the following text:

> "* * * A county may contract with its ministerial officers, where such contracts are not prohibited by statute. * * * ."

The text quoted in 15 C.J. 517, under footnote 61, cites, in support thereof, the case of Board of Commissioners of Tippecanoe County vs. Mitchell, decided by the Supreme Court of Indiana, reported 30 N.E. 409. The Supreme Court of Indiana upheld the validity of the contract and the authority of the county to make it with the county clerk, where, l.c. 410, the Court said:

> "The fact that the appellee was an officer of the county does not of itself authorize the conclusion that the contract is voidable because opposed to public policy. It is quite well agreed that the officers controlling the affairs of a public corporation may contract with ministerial officers of the corporation unless such contracts are prohibited by statute. * * * ."
>
> (Evans v. City, 24 N.J. Law, 764; Detroit v. Redfield, 19 Mich. 376; Mayor v. Muzzy, 33 Mich. 61; McBride v. Grand Rapids, 47 Mich. 236, 10 N. . Rep. 353; U.S. v. Brindle, 110 U.S. 688, 4 Sup. Ct. Rep. 180; State v. Hauser, 63 Ind. 155.)

We are advised here that Montgomery County is without equipment to properly preserve food, prepared or unprepared, for such prisoners, and that, apparently, the Sheriff does have equipment which is being now used for such purposes. Considering the terms of said Section 49.270, supra, providing that the county is authorized to lease property, real or personal, for the benefit of the county, we believe that the County Court of Montgomery County would be acting lawfully and that the same would "be within the scope of its powers or expressly authorized by law" as is required by said Section 432.070, supra, in leasing such equipment from the Sheriff by

contract under the provisions of said Section 49.270, supra.

It will be observed from the terms of said Section 432.070 that the consideration of such contract must be that the contract is to be performed or executed subsequent to the making of the contract. This means, we believe, that Montgomery County would not be authorized to agree in said contract to pay, nor would the Sheriff be authorized to agree in said contract to receive, any compensation from the county for any use made of the Sheriff's equipment for such purposes prior to the making of the contract. The provision noted in said Section 432.070 restricting the consideration of a contract, and the performance thereof, to be executed here subsequent to the execution of the contract is not in conflict, but is in obedience to and is not prohibited by Section 39, Article III of the present Constitution of this State which provides that the General Assembly shall not have power, under Sub-section (3):

> "To grant or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part; ".

We also believe that the provisions of said Section 49.270, authorizing the entering into a contract between Montgomery County and the Sheriff of the County for the leasing by the county his said equipment for its use for such purposes subsequent to the making of the contract, constitute express authority of law so to do and that said Section 49.270 and said contract if made thereunder, would not be in conflict, but would be in compliance with and in obedience to, and not prohibited by, Section 39 of Article III of the present Constitution which states in Sub-section (4) thereof, that the General Assembly shall not have power,

> "To pay or to authorize the payment of any claim against the state or any county or municipal corporation of the state under any agreement or contract made without express authority of law; ".

Sub-section 1 of said Section 221.090 requires the County Court to audit the statement of the Sheriff as to the verity of the account he presents for compensation for boarding

and feeding prisoners confined in the county jail. Webster's New International Dictionary, page 180, defines "audit" in definition 1 as: "A formal or official examination and verification of accounts, vouchers and other records; * * * ."

Sub-section 1 of said Section 221.090 places the duty and responsibility upon the Sheriff to determine what is reasonably necessary to provide, prepare and furnish for board and meals to the prisoners confined in a county jail. Said Sub-section 1 requires that at the end of each month the Sheriff shall submit to the County Court a statement supported by his affidavit of the actual cost incurred by him in the boarding of prisoners, together with the names of the persons and the number of days each spent in jail.

We believe, under the facts submitted to us and the application thereto of the authorities here cited and quoted, we have answered the several questions submitted to us in your request for this opinion.

CONCLUSION.

It is, therefore, considering the premises, the opinion of this Department that:

1) The duty of furnishing, at actual cost, wholesome food to prisoners confined in the county jail of any county in this State is imposed by law upon the Sheriff.

2) At the end of each month the Sheriff shall submit to the County Court his sworn statement of the actual cost incurred in the boarding of prisoners, with the names of the prisoners and the number of days each spent in jail.

3) The County Court is required by the statute to audit the monthly statement of the Sheriff to determine if such board and food have been furnished at actual cost, and if so to then draw a warrant on the County Treasury payable to the Sheriff for such actual cost of performing such services.

4) For the purpose of such audit, the Sheriff should submit to the County Court accounts and vouchers showing what the actual cost of such service has been for the preceding month.

5) It is the duty of the county to supply all furnishings and equipment, including equipment required for preserving

foodstuffs, prepared and unprepared, and serving the same to prisoners confined in the county jail, necessary for maintaining a county jail.

6) If the county does not have such equipment on hand but the Sheriff does have his own personal equipment available for furnishing wholesome food to prisoners in the county jail, the county may lawfully lease, by contract, such equipment from the Sheriff and pay the Sheriff, as rent for the leasing of such equipment, a reasonable sum as part of the actual cost incurred by the Sheriff in performing such services.

7) The Sheriff of every county in this State is prohibited by law from employing for hire, as a part of the cost of preparing, cooking or serving meals to prisoners confined in the county jail of such county, or for any other employment whatever, any relative within the fourth degree of consanguinity or affinity.

8) If the Sheriff of any county has a member of his family who is able and willing to prepare and serve meals to prisoners in the county jail without costs, the Sheriff may lawfully take advantage of such services, but he cannot make a charge against the county therefor.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GWC:ir

PUBLIC PRINTING AND BINDING:
ELECTION LAWS REVISION COMMISSION:

Report required under sub-paragraph three of Section 4 of Senate Bill No. 194 of the 66th General Assembly, to be printed and published through state purchasing agent. Expense of publishing such report to be borne by Election Laws Revision Commission out of appropriation made by the 66th General Assembly.

FILED
48

June 27, 1952

6-27-52

Honorable Edgar A. Keating, Chairman
Election Laws Revision Commission
1250 Dierks Building
Kansas City, Missouri

Dear Mr. Keating:

The following opinion is rendered in answer to your recent request reading as follows:

> "It appears that it will be necessary for the above committee to print its final report to the General Assembly for distribution to the members of the 67th General Assembly convening in 1953, and to the governing boards and attorneys of all of the counties, cities and towns in the state.
>
> The committee would like to have your opinion as to whether the committee itself should make the arrangement of the printing of this report or whether it should be handled through the State Purchasing Agent. The committee would also like to have your opinion as to whether the expense of printing must be paid from the appropriation for this committee or whether it should be paid from the appropriation of the State Purchasing Agent."

Senate Bill No. 194 passed by the 66th General Assembly, provides, in part, as follows:

> "Section 1. 1. There is hereby created an election laws revision commission, hereafter called the commission, which shall consist of six members of the senate and six members of the house of representatives. The senate

members of the commission shall be appointed by the president pro tem of the senate and the house members shall be appointed by the speaker of the house. No major political party shall be represented on the commission by more than three members from the senate or more than three members from the house.

* * * * * * * * * *

Section 2. The members of the commission shall serve without compensation except that they shall be entitled to actual and necessary expenses when in attendance on the meetings of the commission or of its subcommittees and for such necessary expenses incurred in the performance of their duties.

* * * * * * * * * *

Section 4. 1. The commission shall make an investigation and study of the whole body of election and registration laws of the state, such investigation to be made in consultation with election commissioners and officials and those having practical experience in this field, with a view to the codification and harmonization of the law by legislative enactment. Particular attention shall be given to the operation and effect of existing laws, the existence of conflicting, obsolete or otherwise undesirable laws affecting registrations and elections, together with such changes or additions to them as may be needed to provide for orderly and peaceable elections.

* * * * * * * * * *

3. The committee shall prepare and issue a report of its findings, together with any recommendations which it may deem necessary and advisable, and may prepare and draft proposed legislation for the consideration of the general assembly, to implement such findings and recommendations.

4. Such report shall be prepared so that it shall be available to the sixty-seventh general assembly upon its convening in January 1953."

The questions to be decided in this opinion revolve around the report required to be made under sub-paragraph three of Section 4 of Senate Bill No. 194, supra. The opinion request discloses that the Election Laws Revision Commission will have its report printed and bound. We are dealing, in this opinion, with the question of printing and binding of a report, and not with a question relating to the purchase of ordinary supplies. Section 34.170, RSMo, 1949, provides:

> "The state purchasing agent shall purchase all public printing and binding of the state, including that of all executive and administrative departments, bureaus, commissions, institutions and agencies, the general assembly and the supreme court. In such capacity the state purchasing agent is hereby empowered and authorized to take over as a part of the records of his office, all books, documents and records which are now in the hands of the commissioners of public printing and the secretary of state relative to public printing. It shall be the duty of all state officers to order all of their printing and binding through the state purchasing agent. The purchasing agent may authorize any state penal eleemosynary or educational institution to procure all or any part of its own printing and binding."

Section 1.090, RSMo, 1949, discloses the general rule to be followed when intepreting words and phrases contained in a statutory enactment and such section provides as follows:

> "Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."

The above rule of statutory construction has been applied in the Donnelly Garment Co. v. Keitel, 193 S.W. (2d) 577, wherein the Supreme Court of Missouri, said, l.c. 581:

> "* * * And a primary rule of construction of a statute is to ascertain from the language used the intent of the lawmakers if possible, and to put upon the language its plain and rational meaning in order to promote the object and purpose of the statute. Hayes v.

> Unemployment Compensation Commission, supra, 183 S.W. 2d loc. cit. 81, and cases there cited." (Emphasis ours.)

We have examined various law dictionaries and the permanent edition of Words and Phrases in an effort to determine whether or not the phrase "public printing and binding" had acquired a technical meaning which would necessarily have to be applied under the rule quoted in Section 1.090, RSMo, 1949. We do not find that the phrase has acquired a settled and fixed technical meaning at the time of its incorporation in the statute under consideration, and therefore we are required, in construing the statute, to accord the phrase its plain or ordinary and usual meaning.

Reference to Webster's New International Dictionary, Second Edition, discloses the following definitions of the words which have been incorporated in the statute:

> "binding - The fastening of the sections of a book, esp. this fastening and the cover; also, a style or exemplar of book binding."
>
> "printing - Act, art or practice of impressing letters, characters, or figures on paper, cloth, or other material; the business of a printer, including typesetting and presswork, with their adjuncts; typography."
>
> "public - Of or pertaining to the people, relating to, belonging to, or affecting, a nation, state or community at large; -- opposed to private; as the public treasury, credit, good; public opinion, etc. The term public is used in designating the legal character of various acts, rights, occupations, etc., that affect or belong to the collective body of a state, or community."

Applying these definitions to the words found in the phrase under consideration as found in Section 34.170, RSMo, 1949, we are led to the view that the General Assembly thereby referred to printed publications, books, documents, manuscripts, and items of a similar nature, designed primarily for public records and for the dissemination of information relative to the public affairs of the state to the inhabitants thereof. Under the rules heretofore outlined we conclude that the report to be printed and bound under authority contained in sub-paragraph three of said section four of Senate Bill No. 194, supra, comes within the term "public printing and binding of the state" as such phrase is used in Section 34.170, RSMo, 1949.

We now pass to the question of how the expenses to be incurred in printing and publishing the report under consideration are to be borne. House Bill No. 496 passed by the 66th General Assembly, the same being the Omnibus Appropriation Bill, provides in part as follows:

> " * * * Section 10.850. There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of Fifteen Thousand Dollars (15,000.00) for the use of the Election Laws Revision Commission, for the payment of expenses of Members of the Commission and for other necessary expenses, as provided by law, for the period beginning July 1, 1951 and ending June 30, 1953. * * *"

Section 34.230, RSMo, 1949, provides as follows:

> "All accounts accruing under this law shall be submitted by the vendor to the purchasing agent who shall examine such accounts to ascertain if the printing delivered by the contractor complies in all ways with the specifications and the contract governing the same, after which said accounts shall be presented to the officer for whose department the work was done who shall likewise examine the account before submitting it to the comptroller for payment. The purchasing agent shall keep a record of the cost of printing and binding and a copy of each document shall be duly filed and preserved by him, with the number of copies ordered and delivered and the cost endorsed thereon. The cost of all printing and binding, including annual reports, shall be charged to the appropriation of each agency ordering the same." (Emphasis ours)

CONCLUSION

It is the opinion of this department that the report to be printed and published under authority contained in sub-paragraph 3 of Section 4 of Senate Bill No. 194, passed by the 66th General Assembly, comes within the term "public printing and binding of the state" as that term is used in Section 34.170, RSMo, 1949, and

Honorable Edgar A. Keating

that the printing and publishing of the same should be handled through the state purchasing agent, and that the expense incurred for printing and publishing such report is to be charged to the appropriation made by the 66th General Assembly for the Election Laws Revision Commission.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:lw

LOTTERIES:
GIFT ENTERPRISES:

A procedure wherein persons purchase tickets of admission to a theater where they are permitted to participate in a contest which consisted of determining, upon a card furnished by the theater, the correctness of certain statements submitted by the theater to the participants, with a cash prize awarded to the winner, would be a lottery or a gift enterprise, and would therefore be illegal.

September 19, 1952

FILED
48

Honorable Don Kennedy
Prosecuting Attorney
Vernon County
Nevada, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

"I am confronted soon with the question whether a certain quiz program variation, to be sponsored by a local theatre, is a lottery or gift enterprise and in violation of Sec. 563.430, R.S.Mo. 1949.

"The game is played thus:

"The patron, when he purchases his ticket at the theatre, is presented with a card, such as the one attached hereto, and marked Exhibit 'A'.

"At an intermission, the master of ceremonies asks 10 questions, of which the following, with answers, are samples:

"Q. The color of a horse's tail is the same as that of his eyebrows.
A. No. (A horse has no eyebrows.)

"Q. It is known that there are people living on a planet.

A. Yes. (The earth, of course.)

"Q. Coffee contains a large amount of chicle.
A. No. (Coffee contains chicory.)

Honorable Don Kennedy

"Q. England produces the only blue roses.
A. No. (There are no blue roses.)

"Q. The bulldog is a native of England.
A. No.

"The questions are of a general nature and are authentic.

"The patron has folded his card at the perforated line. If he wishes to answer the question 'Yes,' he tears out the corresponding tab, or 'ball;' if 'No,' he leaves the ball tab in the card.

"There is a very minute chance of anyone's being able to guess all the answers correctly; however, if he were able, from his general information, to answer 9 questions correctly, he would have a 50-50 chance of guessing the tenth. If he were able to answer 8 questions correctly, from his general information, he would have a 25-75 chance of answering the other two correctly. Etc.

"When the questions are finished, he tears his card in half at the perforated line, turning one card in to the judge, retaining the other, which of course will be a duplicate.

"Only those who have answered all questions correctly are winners. They divide equally a cash prize. In addition, the winners have an opportunity to answer the 'jackpot question.' Those who correctly answer this question are entitled to divide another cash prize, the 'jackpot.' Both prizes, in case there are no winners, are accumulated and offered on the next succeeding program.

"There is no live master of ceremonies; the program is on a tape recorder and is played over a public address system.

"May I have your opinion whether this game is in violation of the above cited statute as interpreted by the Missouri Courts? I call your attention particularly to State ex rel. McKittrick vs. Globe Democrat Publishing Co., 341 Mo. 862, 110 S.W. 2d 705, 113 ALR 1104."

Honorable Don Kennedy

The question which we have to determine under the state of facts submitted by you is whether the procedure which you have outlined would be in violation of Section 563.430, RSMo. 1949, which section reads as follows:

> "If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

It will be observed that the above section prohibits a "lottery," a "gift enterprise," and a "policy or scheme of drawing in the nature of a lottery." In other words, the specific acts prohibited are "lotteries" and "gift enterprises." We would here point out that while lotteries and gift enterprises are closely related operations that the law does distinguish between them.

In the case of State ex Inf. McKittrick, Atty. Gen., v. Globe-Democrat Publishing Co., 110 S.W. (2d) 705, l.c. 713, the Supreme Court of Missouri stated that: "The elements of a lottery are: (1) Consideration; (2) Prize; (3) Chance." We do not find any Missouri cases which define "gift enterprises" but we do find such a definition in the 1942 case of State v. Fox-Great Falls Theatre Corporation, decided by the Supreme Court of Montana, 132 P. (2d) 689, l.c. 694, in which the Court stated:

> "By reason of the great diversity of constitutional and statutory provisions relating to the subjects, and because of the great variety of fact situations

> presented to the courts, it is impossible to lay down an absolute rule as to what constitutes the distinction between lotteries and gift enterprises, and what consideration is necessary to constitute the scheme a lottery. However, it seems clear that in general a plan is considered within a statute against gift enterprises if it involves an award by chance without the consideration necessary to constitute the scheme a lottery. Grimes v. State, 235 Ala. 192, 178 So. 73; Russell v. Equitable Loan & Sec. Co., 129 Ga. 154, 58 S.E. 881, 12 Ann. Cas. 129. * * *"

Under the authority of the Globe-Democrat case, supra, if the procedure which you outline is a lottery, then it must contain the elements of prize, consideration, and chance, but if it be a gift enterprise, then under the authority of the Fox-Great Falls Theatre Corporation case, supra, it need only contain the elements of award or prize, and chance. We shall not here attempt to determine whether the procedure which you outline is a lottery or gift enterprise since we believe we will be able to demonstrate that it contains the three elements necessary to constitute a lottery, to-wit, prize, consideration, and chance, and since, if it does contain these three elements, it also will contain the two elements necessary to constitute a gift enterprise, to-wit, chance and prize.

It is readily apparent that in the procedure which you outline the element of "prize" is present, since you state that the winners "divide equally a cash prize," and that those who answer the "jackpot question" shall "divide another cash prize."

Let us now turn our attention to the matter of "consideration." In this regard we direct your attention to the 1938 decision of the Missouri Supreme Court in the case of State v. McEwan, 120 S.W. (2d) 1098, in which the Court stated, at l.c. 1100:

> "* * * Courts have uniformly held that the scheme of 'bank night' is a lottery when the participants therein are limited to those purchasing tickets to the theater. * * *"

At l.c. 1102, the Court stated:

> "In 38 C.J. 292, Sec. 7, it is said: 'Whatever may be the nature of the consideration required it may be given either directly or indirectly. The benefit to the person offering the prize does not need to be directly dependent upon the furnishing of a consideration.'"

In view of the above, we believe that the element of "consideration" is present in the procedure which you outline to us.

The final question which we have to determine is whether the procedure which you outline contains the element of "chance." This procedure consists of submitting to participants a certain number of statements, i.e., "The bulldog is a native of England," which either are or are not correct. The participant is given a means by which he can indicate the correctness or incorrectness of these statements. The successful determination of the correctness of these statements calls for factual knowledge, and it would seem that the participant possessing the greatest fund of general, factual knowledge would have the best prospect of winning. For a thorough, protracted discussion of this situation, we again direct attention to the Globe-Democrat case, supra. At l.c. 713, et seq., the Court stated:

> "The elements of a lottery are: (1) Consideration; (2) prize; (3) chance. It is conceded that the first two of these were present in the 'Famous Names' contest, here involved, the sole question being whether the third element--chance-- was there. In England and Canada where the 'pure chance doctrine' prevails a game or contest is not a lottery even though the entrants pay a consideration for the chance to win a prize, unless the result depends entirely upon chance. In the United States the rule was the same until about 1904; but it is now generally held that chance need be only the dominant factor. 38 C.J. § 5, p. 291; 17 R.C.L. §10, p. 1223; Waite v. Press Publishing Ass'n, 155 F. 58, 85 C.C.A. 576, 11 L.R.A. (N.S.) 609, 12 Ann. Cas. 319. Hence a contest may be a lottery even though skill,

> judgment, or research enter thereinto in some degree, if chance in a larger degree determine the result. Whether the chance factor is dominant or subordinate is often a troublesome question."

And further, at 717, the Court stated:

> "Further, we are convinced the question whether the element of chance was present must be viewed from the standpoint of the nearly 70,000 persons who entered the contest in response to the advertising thereof; and that it is not to be measured by any absolute or technical standards. As was said in Coles v. Odhams Press, Ltd., supra, 'The competitor is the person to be considered.' In the instant case the public was informed that any one might win; that no special skill, training, or education was required; and that an opportunity was offered to gain some 'easy money.' It is true reference to the possibility of children's winning was omitted from the later advertising, but aside from that hope was held out to the general public. That being true, whether chance or skill was the determining factor in the contest must depend upon the capacity of the general public--not experts--to solve the problems presented."

We concede that the procedure which you outline is not wholly analogous with the procedure discussed by the Court in the Globe-Democrat case, supra, but we do believe that there is a sufficient similarity to render that case binding in your situation, and that in your situation, the element of chance is at least the dominant factor. It is obvious that if the procedures which you outline were put into operation that the overwhelming majority of the participants would not be savants and persons with vast learning. Such being the case, it would certainly be a matter of pure chance whether or not participants would know whether the statements were correct or incorrect.

Other courts have held that schemes similar to that set forth in your request are decided by chance. Hernandez v. Graves, 148 Fla. 247, 4 So. (2d) 113; People v. One Slot Machine owned by Telequiz Corp., (Ill.) 100 N.E. 788.

Honorable Don Kennedy

Since we believe that the elements of chance, prize, and consideration are all present in the procedure which you outline, we believe that such procedure would be illegal under Section 563.430, supra, whether such procedure was a "lottery" or a "gift enterprise."

CONCLUSION

It is the opinion of this department that a procedure wherein persons purchase tickets of admission to a theater where they are permitted to participate in a contest which consisted of determining, upon a card furnished by the theater, the correctness of certain statements submitted by the theater to the participants, with a cash prize awarded to the winner, would be a lottery or a gift enterprise, and would therefore be illegal.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

INHERITANCE TAX: TRUSTS:
LIFE ESTATE: HOW TAXED:

For the purposes of inheritance taxes a life estate must be valued according to mortality tables, not according to actual duration of life estate.

FILED
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November 7, 1952

11/10/52

Honorable John J. Kelly, Jr.,
First Assistant Circuit Attorney
For the City of St. Louis
Municipal Courts Building
St. Louis, Missouri

Dear Sir:

Your request for a legal opinion of this department has been received and reads in part as follows:

> "The question proposed is as follows:
>
> "'What effect, if any, should be given to Sec. 145.240 R.S. Mo., 1949 pp 3, in computing a life estate for Missouri inheritance tax purposes under Sec. 145.200 R.S. Mo., 1949, when the life tenant dies within eleven months of the decedent's death and before the determination and assessment of inheritance tax?'"

Section 145.240 RSMo 1949, reads as follows:

> "1. Where any property shall after the passage of this chapter be transferred subject to any charge, estate or interest, determinable by death of any person, or at any period ascertainable only by reference to death, the increase accruing to any person or corporation upon the extinction or determination of such charge, estate or interest, shall be deemed a transfer of property taxable under the provisions of this chapter in the same manner as though the person or corporation

beneficially entitled thereto had then acquired such increase from the person from whom the title to their respective estates or interests is derived.

"2. When the property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are wholly dependable upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the lowest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this chapter, and such tax so imposed shall be due and payable forthwith by the executor, administrator, or trustee out of the property transferred; provided, however, that on the happening of any contingency or condition whereby the said property or any part thereof is transferred to a person or corporation, which under the provisions of this chapter is required to pay a tax at a higher rate than the tax imposed, then such transferee shall pay the difference between the tax imposed and the tax at the higher rate, and the amount of such increased tax shall be enforced and collected as provided in this chapter; provided further, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this chapter, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this chapter. Such return of overpayment shall be made in the manner provided by section 145.250, upon the order of the court having jurisdiction.

"3. Estates in expentency which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or

> on account of any valuation theretofore made of the particular estate for purposes of taxation, upon which said estates in expectancy may have been limited. Where an estate for life or for years can be divested by the act or omission of the legatee or decisee it chall be taxed as if there were no posibility of such divesting."

Section 145.200 RSMo 1949, provides the method for the valuation of life estates, and when the tax on same is due. Said section reads as follows:

> "When any property, interest thereon or income therefrom belonging to any estate in course of administration, shall pass or be limited for the life of another or for a term of years, or to terminate on expiration of a certain period, the value of property at the date of death so passing shall be determined by appraisal for the purpose of taxes under this chapter immediately after the death of the decedent and the value of said life estate, term of years or period of limitation, shall be valued according to mortality tables, using the interest rate or income rate of five per cent, and the value of the remainder in said property so limited shall be ascertained by deducting the value of the life estate, term of years or period of limitation from the clear market value of the property so limited and the tax on the transfer of the separate estate or estates, remainder or remainders or interest shall be immediately due and payable, to the director of revenue together with interest thereon and said tax shall accrue as provided in section 145.110 and remain a lien upon the entire property until paid; provided, that the persons, institutions, association or corporation beneficially interested in property chargeable with said tax may elect not to pay the same until they shall come into actual possession or enjoyment of such property, then in that case said person, association or corporation shall give bond payable to the state of Missouri, in a penal sum three times the sum or amount of taxes due upon such transfer, with such sureties as the probate court, or any other court having jurisdiction of the matter, may approve, conditioned for the payment of said tax and interest thereon from the date such tax is due at such time or period as they or their representatives may come into the actual possession or enjoyment of said property, which bond

> shall be executed in triplicate and one copy filed in the office of the probate judge of the proper county, one with the department of revenue and the other with the secretary of state; provided further, that every person, institution, association or corporation shall make and file with the probate court of the county a full verified return of said property, or interest therein, within one year of the death of the decedent, with the bond and sureties as above provided; and provided further, said person, institution, association or corporation shall renew said bond every five years after the date of the death of decedent."

Briefly stated, the facts upon which the opinion request is based are these:

A husband and wife entered into a trust agreement with the St. Louis Union Trust Company, under which agreement the trust company received certain personal property and was to pay the income therefrom to husband and wife as beneficiaries in equal shares for their lives. Upon the death of one of the beneficiaries, the survivor was to receive all the income, and upon the death of the survivor-beneficiary, the corpus of the trust fund, together with any accrued income thereon was to be paid to designated persons in certain proportions.

Other facts relating to the transaction, as well as the position taken by the inheritance tax appraiser of the widow's estate, in regard to the imposition of the inheritance taxes on her life estate in the income of the trust are given in a letter from an officer of the trustee-corporation to the inheritance tax appraiser, and reads in part as follows:

> "The controversy that you and I are now having is concerned with the taxation of the life estate of the Widow, * * *."
>
> "In the Trust Fund the Widow was given a life estate, with remainder over at her death to various relatives. Her attained age at the date of her husband's death was 81, and the factor which we used was 3.313 on a 5% interest basis. The Widow, unfortunately, died on September 15, 1951, which was 10 months and 23 days after her husband, and subject decedent, died.
>
> "As I understand your position, you state that under Section 145.240 R.S. Mo 1949 pp 3, that

> since the tax has not already been adjusted and since the Widow's death has already occurred, that you should only charge her with the income for 10 months and 23 days and charge the remainder over to the relatives."

In view of the position taken in the matter by the inheritance tax appraiser, the inquiry of the opinion request resolves itself into the inquiry as to whether the provisions of Section 145.240, supra, are applicable and should be given effect in computing the value of the widow's life estate under Section 145.200, supra, that is, should the widow be taxed only on the amount of the trust income she received for 10 months and 23 days, up to the time of her death, or should she be taxed on the estimated value of her life interest in the trust income, under the provisions of the latter section.

Unfortunately, this proposition has never been passed upon by any of the appellate courts of Missouri, consequently in our research, it is necessary that we look to inheritance tax statutes of other states similar to those of Missouri, and to decisions of such other states interpreting said statutes.

We here call attention to the general rule for the taxation of life estates in most jurisdictions as given by Gleason and Otis in their work: "Inheritance Taxation," page 497, as follows:

> "Whether the life estate be absolute or defeasible, as by remarriage, or <u>per autre vie</u>, whether subject to dower and curtesy, or whether it is coupled with a power to invade the principle or power of appointment, or limited by time, as surviving to a certain age; it is, in the contemplation of inheritance tax law, a present right presently valuable and taxable."

Again we quote from page 505 of the same work, in which the basis for assessment of a life estate for inheritance tax purposes is given and which theory of taxation is fully in accord with that now prevailing under Missouri statutes. We quote as follows:

> "The theoretical value of a life estate computed upon the mortality tables and rate of interest fixed by the State is the value at death of the testator, and not the actual duration of life, and it is the legal measure of the value of a life estate, although the life tenant only survived the testator a few months. Howe v. Howe, 179 Mass. 546; 61 N. E. 225.

"Though it might seem an injustice to tax the theoretical value of a life estate of a woman of thirty whose expectation of life is thirty-five years and whose interest in the fund is about three-fourths its entire amount at full value when she actually survives the testator only a few hours, the logic that a time must be fixed for valuation and that time is the death of the testator is immutable and has thus far been uniformly sustained."

(Underscoring ours.)

"The Supreme Court of Wisconsin reasons thus:

"'The right to receive being the subject of inheritance taxation, the amount is regulated, primarily, by the value of the right. The right in the particular case has reference to the privilege to receive, for life, the yearly payments. There may be many payments, but the right is an entirety. That vested, subject to the burden on the transfer, as soon as the will was allowed. Clearly it could be valued, the transfer tax assessed thereon, and be wholly liquidated, if such be the legislative plan.'"

(Underscoring ours.)

Again in the case of Matter of Potter, 224 N.Y.S. 383, at l.c. 384, the court said:

"The decedent died September 23, 1926. The first ground of appeal is denied. Elzia J. Vaughn died one week subsequent to the decedent. The appraiser properly fixed the value of her life estate upon the expectancy as at the date of death of decedent and not upon the actual duration of her life * * *."

"Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full undiminished value when the persons entitled thereto shall come into the beneficial

enjoyment or possession thereof, * * *."

It is true under the above facts that the estate of the widow in the entire income of the trust fund was one in expectancy, contingent and defeasible during her husband's life. In such instance the contingency was that she must survive her husband before she would be entitled to the income. However, upon the death of her husband, the widow became vested of a life estate in said property, and her interest therein was no longer contingent or defeasible within the meaning of the statute.

While it is true that no proceedings for the determination of the widow's tax had been taken during her life, it is not true that the taxation of her interest had been held in abeyance up until the time of her death within the meaning of the statute, or that any delay in the assessment and imposition of the tax was authorized by the statute.

Section 145.200, supra, is the section by which the method of taxation of the widow's interest is to be computed, and since the facts are not those coming within the meaning of Section 145.240, pp 3, supra, that portion of the statute is inapplicable, and is not to be considered in arriving at the taxable value of the widow's life estate under the provisions of Section 145.200, supra.

As noticed above, the right of the widow to receive the entire income from the trust fund was one to which she became entitled upon the death of her husband, and it was upon this right at that time, rather than the income that she actually received, that the taxes were due and payable at the lowest possible rate, as provided by paragraph 2, Section 145.240, supra. It is also noted that neither Section 145.200 or 145.240, supra, does not provide for any delay, nor does Section 145.200 authorize the payment of taxes on the right to receive anything less than the estimated value of the life expectancy; therefore, it is immaterial that the widow did not receive the total income for her life expectancy. She came into possession and enjoyment of taxable property upon the death of her husband within the meaning of inheritance taxing statutes, and decisions in Missouri.

In this connection we call attention to the definition of the terms "possession and enjoyment," used in inheritance taxing statutes, as given in the case of In Re: Estate of Costello v. King, 338 Mo. 673, in which the court said at l. c. 678.

> "The words 'any person' as used means a person or persons lawfully entitled to possession and enjoyment. If so, the act provides for the imposition of the tax when the executrices of the estate of Mrs. Robison

> actually come into the possession and enjoyment of the property. As used, the word 'enjoyment' does not mean personal enjoyment. It means control. * * *
>
> "Furthermore, Mrs. Robison had a vested interest in her share of James Costello's property, subject to administration and lawful charges. She shared in any income from the property. Furthermore, she enjoyed the privilege of transferring the property by will to her daughters. We think she actually came into the enjoyment of the property within the meaning of the act. * * *"
>
> (Underscoring ours.)

In view of the foregoing, it is our thought that the widow came into possession and enjoyment of the right to receive all the income of the trust for life upon the death of her husband, within the meaning of Section 145.200, supra, and it was at that time the tax upon such right became due and payable. The statute makes no allowance nor does it authorize the deferred payment of the tax on any sum less than the full estimated value of the life estate in such cases. Therefore, pp 3, Section 145.240, supra, in inapplicable and of no effect in computing the tax on said widow's life estate under Section 145.200, supra, when the widow survived her husband and received trust income for only ten months and twenty three days and died before the determination and assessment of the tax on the value of her said life estate.

CONCLUSION

It is the opinion of this department that when a widow becomes vested in a life estate in the income of a trust upon the death of her husband and only receives such income for the period of ten months and twenty-three days immediately preceding her death, that in computing the value of said life estate for state inheritance tax purposes, the provisions of paragraph 3, Section 145.240 RSMo 1949, are inapplicable and are not to be given any effect. The value of said life estate must be computed under Section 145.200, and the inheritance taxes imposed thereon must be on the full value of said life estate.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PNC:hr

GRAND JURIES:
CITY OF ST. LOUIS:

A Grand Jury selected for the September, 1952, Term of the Circuit Court cannot legally be continued into or for the December, 1952, Term of said Court.

FILED
48

November 24, 1952

11/26/52

Mr. John J. Kelly, Jr.
First Assistant Circuit Attorney
Municipal Courts Building
St. Louis, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion, which request reads:

> "Pursuant to the provisions of Sec. 27.040 Revised Statutes of Missouri, 1949, on behalf of the Office of the Circuit Attorney for the City of St. Louis, Missouri, I wish hereby to request an opinion of your office relative to the following matters:
>
> "1. may a Grand Jury impanelled by the presiding judge in the Assignment Division of the St. Louis Circuit Court for Criminal Causes in one term of Court be legally continued into the following term for the purpose of completing an investigation begun during the term for which it was impanelled?
>
> "2. if said Grand Jury may be so legally continued into the following term, what legal technicalities must be complied with?
>
> "Due to the fact that these questions now confront us in an investigation now being conducted by the current Grand Jury in the City of St. Louis, and since the term of this Grand Jury will expire on the 28th day of November, 1952, it is particularly urgent that an opinion be forthcoming as quickly as possible."

The purposes for which terms of court were abolished by the so-called "New Civil Code of Practice and Procedure", Chapter 506, RSMo 1949, does not apply to criminal matters. Section 506.020 provides:

> "This code shall not apply to practice and procedure in criminal cases except to the extent that its provisions or any of them are now or hereafter may be made applicable by statute. If it occur that inadvertently this (civil) code may affect any change in the practice and procedure in criminal cases as the same exists at the time of the passage of said code, the supreme court shall and is hereby directed to immediately promulgate a rule restoring such a provision or provisions of said criminal practice and procedure to the end that the present practice and procedure in criminal cases shall not be changed except by a legislative act passed for that specific purpose."

Furthermore, the provisions of the Code provide for terms and their duration. Section 506.070 states:

> "Every term of court shall commence and convene by operation of law at the time fixed by statute without any act, order, or formal opening by a judge, the judges, or other officials, and shall continue to be open at all times until and including the day preceding the next regular term on which day it shall expire by operation of law."

This section is cited for the purpose of showing the illegality of continuing a term by the old method of "stopping the clock."

Under Section 506.070, RSMo 1949, the present September, 1952, term of the Circuit Court in the City of St. Louis, as established by Section 478.230, RSMo 1949, will expire for all purposes on November 30, 1952.

We believe the method provided by law for the creation of a Grand Jury Wheel and the procedure established for the selection of a Grand Jury therefrom prohibit the continuing over to another term a Grand Jury selected for the preceding term of the Court. Section 498.290, RSMo 1949, provides the method of placing names in a Grand Jury Wheel:

> "1. The circuit judges in general term shall select the names of six hundred persons, known or believed by them to be in every way fitted for grand jury service, said selection to be repeated whenever deemed necessary by said judges of the circuit court, which names shall, by said judges, be erased from the petit jury lists in the said board of jury supervisors office, or caused by them to be erased by said jury commissioner, but by them to be deposited in a special grand jury wheel, which, after being properly secured, shall be delivered to the care of the jury commissioner of the board of jury supervisors, who shall be responsible for the proper custody of the same, and which after the names are once placed therein, shall be opened and drawn only, by said jury commissioner, or one of his deputies, in the presence of two or more of said circuit judges, upon the requisition of the judge of the criminal division of the circuit court for such number of grand jurors as may be required for any one term in said court." (Emphasis ours.)

Section 498.300, RSMo 1949, prescribes the method of selecting the personnel of a Grand Jury and its term of service. Said section reads:

> "The number of names of grand jurors to be thus drawn from said special grand jury wheel shall not be less than twenty-four for any one term of said criminal division of the circuit court, but may be increased by the judge of said court, as special circumstances may require. From the names thus drawn, the judge of the criminal division of the circuit court, shall select twelve grand jurors who shall serve for the current term of said court, and the names of such persons that have been drawn, but not selected to serve by said judge, shall be returned to the special grand jury wheel by the jury commissioner of the board of jury supervisors, in the presence of one or more of said circuit judges, immediately after the term for which they were drawn." (Emphasis ours.)

Also, in connection with establishing a division or divisions of the circuit court to handle criminal matters, Section 478.417, RSMo 1949, provides in part the following in connection with a Grand Jury:

> "4. A grand jury shall be summoned each term to attend upon such division assigned to criminal business as said circuit court in general term shall direct. It shall be charged with regard to its duties by the judge of said court sitting in said division, and it shall return all indictments by it found, and deliver all reports by it made into said division."
>
> (Emphasis ours.)

We believe it is apparent from these three sections, and especially the underlined parts, that a Grand Jury must be selected as provided and its tenure is limited to the term for which it was drawn, so that a jury selected for a term of court in any manner other than that provided by the statute (such as selecting a Grand Jury for a term by continuing over the one selected for the previous term) would be illegally constituted.

We do not find any cases on this proposition, but we think the statute is clear, which probably accounts for the absence of court decisions.

In addition to the foregoing, Section 498.270, RSMo 1949, provides:

> "No person shall be required to serve as a juror, either grand or petit, more than once in any period of twelve months, from the time of his previous service."

This section was construed in the case of Williamson v.

Transit Company, 202 Mo. 345, as conferring a personal privilege to a juror, who has served within twelve months, to be excused. At the time of this decision, there was in operation another section of the statute which made such service a ground for challenge, Section 6547, RSMo 1890 (now repealed). The Court held they were not conflicting and said, l.c. 368:

> "While section 6567 of said article provides that, 'No person shall be required to serve as a juror, either grand, petit or special, more than once in a year,' there is nothing in either section 6547 or section 6554 which makes it the duty of any court of record to excuse from service as a juror any person who has served as such during the year in which the case is being tried, nor which prohibits the summoning of such person as a juror, but by the express provision of section 6547 the time within which a person summoned as a juror may be challenged on account of having served upon a jury is twelve months next preceding the time of the trial. These sections are, therefore, not in conflict, and section 6547 is controlling. Moreover, section 6567 seems to confer upon a person summoned as a juror, and who has rendered service as such the same year, the personal privilege of claiming exemption from jury service upon that account, but there is nothing in the article which forbids the summoning of such person as a juror. * * * "

See also Blyston-Spencer v. United Rys. Co. of St. Louis, 152 Mo. App. 118, 132 S.W. 1175; Turney v. United Rys. Co. of St. Louis, 155 Mo. App. 513, 135 S.W. 93.

We are of the opinion that this section confers only a personal privilege to a juror and is not in point on your question, but was cited and discussed to eliminate it from consideration.

Mr. John J. Kelly, Jr.

CONCLUSION

It is therefore the opinion of this department that the present Grand Jury, constituted by the Circuit Court of the City of St. Louis for the September Term of 1952, will cease to exist as of November 30, 1952, and that it cannot legally be continued as a Grand Jury into or for the December, 1952, term of said Court.

Respectfully submitted,

W. BRADY DUNCAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WBD:VLB

ELECTIONS: Ward formed in Kansas City and Clay County entitled to committeeman and committeewoman on Clay County Central Committee.

FILED
49

February 14, 1952

2-14-52

Honorable Robert G. Kirkland
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Mr. Kirkland:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

> "Clay County is a county of the third class, having a population of a little over 45,000. It contains six townships; one of the townships is occupied in part by a part of Kansas City, Missouri, which I believe is a first class city. That part of Kansas City in Clay County does not occupy the entire township and has a population of around 15,000. That township probably has a population of around 25,000 or a little better. That part of Kansas City which is in Clay County constitutes Ward 21 of Kansas City, Missouri. Under the present organization of the Democratic Central Committee in Clay County the committee is composed of one committee man and one committee woman from each township. Under the above facts and the provisions of Chap. 120 of the Missouri Revised Statutes, is the Central Committee entitled to any additional members from this particular township or from Ward 21 of Kansas City, Missouri, and if so, how many and on what basis would the number and location of the committee members from this township be determined? If additional members are permitted how are they to be selected? If they are to be appointed by the Governor upon the recommendation of the Central Committee what proof is necessary to be furnished to the Governor's office, showing him that additional committee members are permitted and allowed from this township or ward?"

Section 120,770, RSMo 1949, provides as follows:

> "At the August primary each voter may write in the space left on the ballot for that purpose the names of a man and a woman, qualified electors of the precinct, or voting district as the case may be, for committeemen for such township, or voting district, and the man and the woman receiving the highest number of votes in such township, or election district, shall be the members of the party committee of the county of which such voting precinct or district is a part. Any qualified elector in any such voting precinct or district may have his or her name printed on the primary ballot or party ticket on which he or she may desire to become a candidate for committeeman or committeewoman by complying with the provisions of section 120.340 and, in all counties in this state now or hereafter containing a city of the first class, by also paying the sum of five dollars to the treasurer of the county committee of the party on whose ticket he or she seeks election."

Section 120.760, RSMo 1949, provides as follows:

> "The word 'county' as used in sections 120.770 to 120.840 shall include the several counties of this state and the city of St. Louis, and the word 'precinct' and the words 'election districts' shall include and refer to wards or townships as the case may require, but shall not apply to any subdivision less than a ward within any city subdivided into wards or to any subdivision less than a township in any county."

Under the provisions of Section 120.760, supra, an election district applies to a ward within any city subdivided into wards. Therefore, the presently constituted Ward 21 of Kansas City which is located in Clay County is an "election district" from which a committeeman and a committeewoman are to be elected to the Clay County Central Committee.

Honorable Robert G. Kirkland

The township within whose boundaries Ward 21 of Kansas City is now located is also entitled to a committeeman and a committeewoman but the committeeman and committeewoman from such township are to be voted on, of course, only by the voters residing outside of Ward 21 of Kansas City.

CONCLUSION

It is the opinion of this department that a committeeman and a committeewoman who will be members of the Clay County Central Committee are to be selected from Ward 21 of Kansas City, which ward is located in Clay County. It is the further opinion of this department that the township in Clay County which includes Ward 21 of Kansas City is to be represented on the Clay County Central Committee by a committeeman and a committeewoman, such committeeman and committeewoman to be selected from that part of the township lying outside of Ward 21.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ELECTIONS:
COMMITTEEMEN:
COMMITTEEWOMEN:

Creation of Ward 21 in that part of Kansas City located in Clay County creates vacancy in ~~commission~~ of committeemen and committeewomen in such ward of county central committee of Clay County. Governor can fill vacancies upon official advice that Ward 21 has been created by Election Board of Kansas City.

FILED
49

February 18, 1952 2-19-52

Honorable Robert G. Kirkland
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting a supplemental opinion of this department relative to committeemen and committeewomen in Ward 21 of Kansas City, Missouri, located in Clay County, Missouri. Your letter reads as follows:

> "Thank you very much for forwarding the opinion concerning additional committeemen and committeewomen in Clay County.
>
> "The point has been raised that not all of the questions asked have been answered by your opinion. The Democratic committee desires the appointment of these additional members now pending the election. They have been informed by the Governor's office through Mr. Kirkpatrick, I believe, that the Governor will appoint those they recommend upon the furnishing of some kind of proof showing that they are entitled to such. They desire to know if this can be done, and, if so, what proof it is that the Governor's office requires.
>
> "Evidently my questions were not clear and I do not know if they are yet. The point appears to me to be whether or not they can get these additional members appointed now, and, if so, how they can go about getting it done. I would appreciate it if you could enlighten us on these points."

Hon. Robert G. Kirkland

In the case of State on Inf. Taylor v. Kiburz, 203 S.W. 2d 285, the Supreme Court in discussing the question of when a vacancy arises when a job is created, said l.c. 290:

> " * * * In State ex rel. Brown v. McMillan, 108 Mo. 153, 159, 18 S.W. 784, 785, it was said: 'We think that both authority and the spirit of our institutions favor the view that when an office is created, and no restrictions for filling the vacancy are imposed, a vacancy arises ipso facto.'"

Since we have already ruled in our previous opinion to you, to which you refer, that the creation of Ward 21 entitles such ward to be represented by a committeeman and a committeewoman on the Clay County central committee, we believe it to be clear that the creation of such ward also creates a vacancy in the offices of committeemen and committeewomen from such ward.

We are enclosing copy of an official opinion of this department rendered under date of June 30, 1950 to Honorable Forrest Smith which holds that the governor at present has the power to fill vacancies in the office of committeemen and committeewomen. Therefore, the governor at present has the power to fill the offices of committeemen and committeewomen from Ward 21 of Kansas City.

Since the creation of Ward 21 created the vacancies in such office, the only proof necessary to show that such vacancies exist would be a copy of the designation of Ward 21 by the Board of Election Commissioners of Kansas City, which board had power under the law to designate and bring into being such ward.

CONCLUSION

It is the opinion of this department that there is a vacancy in the offices of committeemen and committeewomen from Ward 21 of Kansas City, located in Clay County, Missouri, and that the governor may fill such vacancies by appointment. It is the further opinion of this office that the designation by the Kansas City Board of Election Commissioners of Ward 21 as a separate ward of Kansas City is a sufficient authority to authorize the governor to make such appointments.

Respectfully submitted,

APPROVED:

J. E. TAYLOR
Attorney General

C. B. BURNS, JR.
Assistant Attorney General

CONSTITUTIONAL LAW: Circuit clerk of third class county having assessed valuation in excess of
CIRCUIT CLERK: $50,000,000 shall perform duties as ex officio parole commissioner and
COUNTIES: receive maximum compensation as provided for third class counties under S.C.S.S.B. No. 227, enacted by the 66th General Assembly.

FILED
49

March 4, 1952

3-10-52

Honorable Robert G. Kirkland
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion upon questions raised in the attached letter of the Circuit Clerk of Clay County, Missouri, Mr. Clifford G. Hall. That letter requests a construction of S.C.S.S.B. No. 227 as passed by the 66th General Assembly, particularly as it applies to the clerk of the circuit court in a third class county having an assessed valuation exceeding $50,000,000. The pertinent part of said request reads:

> "In setting up compensation in the various counties the Bill states as follows to-wit: Counties with assessed valuation of 25 million dollars or over and less than 50 million dollars, nine hundred dollars per year. Clay County's assessed valuation for 1951 was 63 million dollars, being the fourth year with an assessed valuation of over 50 million dollars. It is my contention that we being a third class County and third class Counties having an assessed valuation of less than 50 million, even though we are on our fourth year with an assessed valuation of over 50 million, my office would come under the clause which includes Counties from 25 million to 50 million dollars, until such time as we become a 2nd Class County.
>
> "If that isn't correct then I would like to have an official opinion on the constitutionality of a bill making all Circuit

> Clerks in third and fourth class Counties Parole Commissioners and not including compensation for that duty to one Circuit Clerk.
>
> "In the event it is constitutional will I be compelled to perform that duty in this, the busiest Circuit Clerk's office in the Third Class in the State, without compensation."

The title of the bill clearly indicates that it applies to all circuit clerks of third and fourth class counties relative to providing for a parole commissioner in such counties and fixing his duties and compensation. Thus the title of the act reads as follows:

> "AN ACT
>
> "Providing for a parole commissioner in counties of the third and fourth class, and fixing his duties and compensation."

In the body of the act certain duties are provided for to be performed by all circuit clerks of third and fourth class counties acting as ex officio parole commissioners. The question which you have presented requires our determination whether or not the Circuit Clerk of Clay County, which has an assessed valuation in excess of $50,000,000, would be entitled to any compensation for performing the duties of parole commissioner in view of Section 6 of the act, which reads:

> "For the performance of all duties imposed upon him as parole commissioner, the clerk of the circuit court shall receive, in addition to all other compensation now allowed by law, the following compensation, payable out of the county treasury:
>
> "In fourth class counties where the assessed valuation is less than five million dollars, six hundred dollars.
>
> "In fourth class counties where the assessed valuation is more than five million dollars, seven hundred dollars.

> "In third class counties where the assessed valuation is more than ten million dollars but less than twenty-five million dollars, eight hundred dollars.
>
> "In third class counties where the assessed valuation is more than twenty-five million dollars but less than fifty million dollars, nine hundred dollars."

Section 8, Article VI of the Constitution of Missouri, is a mandate for the Legislature to pass legislation for the organization and classification of counties in this state, with the limitation that the number of classes shall not exceed four and that a law applicable to any county shall apply to all counties in the class to which such county belongs. Thus the constitutional provision reads:

> "Provision shall be made by general laws for the organization and classification of counties except as provided in this Constitution. The number of classes shall not exceed four, and the organization and powers of each class shall be defined by general laws so that all counties within the same class shall possess the same powers and be subject to the same restrictions. A law applicable to any county shall apply to all counties in the class to which such county belongs."

In compliance with the above constitutional provision the General Assembly enacted Section 48.020, RSMo 1949, which places all counties within four classes and provides, in part, that those counties now having or which may hereafter have an assessed valuation of $10,000,000 and less than $50,000,000 shall be third class counties. Section 48.020 provides:

> "All counties of this state are hereby classified, for the purpose of establishing organization and powers in accordance with the provisions of section 8, article VI, Constitution of Missouri, into four classes as follows:
>
> "Class 1. All counties now having or which may hereafter have an assessed valuation of

> three hundred million dollars and over shall be in the first class.
>
> "Class 2. All counties now having or which may hereafter have an assessed valuation of fifty million dollars and less than three hundred million dollars shall be in the second class.
>
> "Class 3. All counties now having or which may hereafter have an assessed valuation of ten million dollars and less than fifty million dollars shall be in the third class.
>
> "Class 4. All counties now having or which may hereafter have an assessed valuation of less than ten million dollars shall be in the fourth class."

Although Clay County has had for the last four years an assessed valuation in excess of $50,000,000, which is the maximum assessment for a third class county, it still must be classified as a county of the third class. Under Section 48.030, RSMo 1949, Clay County must be classified as a third class county until its assessed valuation in excess of $50,000,000 has occurred for five consecutive years. Section 48.030 thus provides:

> "For the purpose of determining the initial class of the various counties, the assessed valuations of the respective counties as set forth on pages 333 to 400 of the 'Journal of the Board of Equalization of the State of Missouri for the Year Ending December 31, 1944' shall be used; provided, however, that hereafter no county shall be deemed as moving from a lower class to a higher class or from a higher class to a lower class until the assessed valuation of said county shall have been such as to place it in such other class for five successive years; provided further, that the change from one classification to another shall become effective at the beginning of the county fiscal year following the next general election after the certification by the state equalizing agency for the fifth successive year that said county possesses an

> assessed valuation placing it in another class; provided further, that if a general election shall be held between the date of such certification and the end of the current fiscal year, such change of classification shall not become effective until the beginning of the county fiscal year following the next succeeding general election."

Consequently, in construing S.C.S.S.B. No. 227, Clay County must be considered a county of the third class.

In answering the question which you have presented our task is to construe the above bill, applying the appropriate rules of statutory construction.

The paramount rule to be followed in construing a statute is to ascertain the intention of the Legislature and give a construction of the law in compliance therewith. The appellate courts of this state have many times so held.

Another rule is to favor a construction which would tend to avoid injustice and absurd results and to apply a construction which would be in harmony with reason.

In Fischbach Brewing Co. v. City of St. Louis, 231 Mo. App. 793, 95 S.W. (2d) 335, l.c. 339, the court said:

> " * * * A cardinal rule of statutory construction is to give effect to the legislative intent, where ascertainable; another is to favor such a construction which would tend to avoid injustice, oppression, and absurd and confiscatory results and be in harmony with the rule of reason. * * *"

In State ex rel. Hammer v. Wiggins Ferry Co., 208 Mo. 622, 106 S.W. 1005, the court, at Mo. l.c. 640, said:

> " * * * That which is within the meaning of a statute is as much a part of it as if it were written therein. Judge Scott stated the same rule in this language: 'A thing which is in the intention of the makers of a statute is as much within the statute as if it were within the letter.' * * *"

In Stack v. General Baking Co., 283 Mo. 396, 223 S.W. 89, the court set out several rules of statutory construction which must be followed in interpreting the statute. Thus, at S.W. 93, it was said:

> "As said by this court in the case of Keeney v. McVoy, 206 Mo. loc. cit. 68, 103 S.W. 946, quoting from an earlier case:
>
> "'The letter of a statute may be enlarged or restrained, according to the true intent of the framers of the law.'
>
> * * * * * *
>
> "In case of St. Louis v. Christian Brothers College, 257 Mo. 541, loc. cit. 552, 165 S.W. 1057, it was held:
>
> "'It is permissible in arriving at the intent of the lawmaker to either expand or limit the meaning of his words, when it becomes necessary to make the law harmonize with reason.'
>
> "It was said by Judge Lamm in case of Rutter v. Carothers, 223 Mo. 631, loc. cit. 643, 122 S.W. 1056, 1060:
>
> "'Those are recognized canons of construction which ordain that the naked letter of the law must gently and a little give way to its obvious intendment; that those who interpret the laws must not impute injustice to the lawmaker by so interpreting his language as to unnecessarily produce harsh and unreasonable results, or impute to him a disposition callous to natural justice.'
>
> "Judge Walker held, in the case of Johnston v. Ragan, 265 Mo. 420, loc. cit. 435, 178 S.W. 159, 163:
>
> "'Statutes are not to be construed so as to result in an absurdity or to impose unnecessary burdens.'"

In State ex rel. Webster Groves Sanitary Sewer Dist. v. Smith, 342 Mo. 365, 115 S.W. (2d) 816, the Supreme Court declared that the strict letter of the act must yield to the manifest intent of the Legislature. So, at S.W. l.c. 823, the court said:

> " * * * In construing an act, the true intention of the framers must be followed, and where necessary the strict letter of the act must yield to the manifest intent of the Legislature. * * *"

As heretofore pointed out in the title of the act we are considering, the clearly declared purpose of the law is to provide for a parole commissioner in all counties of the third and fourth class, fix his duties and provide for his compensation for performing said duties in all of said counties. The performance of the duties of parole commissioner is imposed on all circuit clerks of third class counties, including Clay County, although its assessed valuation is in excess of $50,000,000.

In reading Section 6 of the act, the manifest intent of the Legislature was to increase the compensation of the circuit clerk for performing the duties of parole commissioner in counties with the greater assessed valuation. Consequently, to construe the act as to preclude the Circuit Clerk of Clay County from receiving any compensation for performing said duties would be inimical to the legislative intent. It would border on absurdity to say that the Legislature intended to fix a compensation for performing the duties of parole commissioner in counties of lesser assessed valuation, but, without justification or reason, intended to deny compensation for performing the same duties in the third class county of the highest assessed valuation.

Therefore, to give a just and reasonable construction to the act, and one which we believe is consonant with the intent of the lawmakers, we must conclude that the Circuit Clerk of Clay County is entitled to the maximum compensation as provided in the act for performing the duties of parole commissioner in third class counties.

A further basis for giving such interpretation to the act is to avoid giving it a construction as would render it unconstitutional.

The appellate courts of this state have many times held that statutes must, if reasonably possible, be construed to be constitutional, and that if there are two possible constructions,

the one which would uphold its validity would be adopted rather than the one which would defeat it. Baerveldt & Honig Const. Co. v. Dye Candy Co., 357 Mo. 1072, 212 S.W. (2d) 65; Zinn v. City of Steelville, 351 Mo. 413, 173 S.W. (2d) 398; Kelly v. Howard, 233 Mo. App. 474, 123 S.W. (2d) 584.

In the case of Colley v. Jasper Co., 337 Mo. 503, 85 S.W. (2d) 57, the Supreme Court of Missouri was considering the constitutionality of a law fixing the compensation of county superintendents of schools in counties having a population over 100,000 and less than 350,000 at $6,000 per year. Under this classification the law only applied to Buchanan, Greene, Jasper and St. Louis counties, and it did not apply to Jackson County which had a population in excess of 350,000. Consequently, in Jackson County the county superintendent could only be paid $2,250 per year under another general law fixing this amount of compensation in counties having a population over 50,000. The court first pointed out that the duties to be performed by such official in all five counties were essentially the same and that there was no reasonable basis for classifying Jackson County in a lower bracket insofar as fixing the compensation of the county superintendent of schools was concerned. The court then declared the act unconstitutional as being a special law prohibited by Subdivisions 32 and 33 of Section 53 of Article IV of the Constitution of 1875. These constitutional provisions are contained in our 1945 Constitution, without change in substance, in Subdivision 30 of Section 40 of Article III and Section 41 of Article III. At S.W. l.c. 62 the court said:

> " * * * We are unable to find in the matters urged by appellant or in the facts and data submitted by the record any substantial differences in the situation and conditions pertaining to the office of county superintendent of schools in Jackson county as compared with the counties coming within the operation of section 9464 that could afford a reasonable or sound basis for classifying Jackson county in a lower bracket as regards the county superintendent's salary than the counties included in the act. That is sufficient to condemn the act in question as a special law prohibited by subdivisions 32 and 33, section 53, article 4, of the Constitution. And we think it may well be said, also, that, in view of the facts and circumstances above mentioned, said act is not

> uniform in its operation. Whether or not a general law could be made applicable is by express provision of the Constitution a judicial question. That it could be we think is clear, as evidenced by the fact that a general law, section 9463 (Mo. St. Ann. Sec. 9463, p. 7257), had been enacted and was in force for many years prior to the passage of section 9464. * * * It is our opinion, and we hold, that said section 9464 (Mo. St. Ann. Sec. 9464, p. 7258) is unconstitutional and void. * * *"

In the act we are considering there would be no sound basis for excluding Clay County, a county of the third class, from coming within its provisions insofar as compensating the circuit clerk acting as parole commissioner is concerned. The circuit clerk in Clay County will be performing essentially the same duties while acting as parole commissioner as will the circuit clerks in other counties of the third class.

Were we to determine the legislative intent as excluding Clay County we would be constrained to seriously consider that portion of the act providing for compensation as special legislation prohibited by the Constitution, and if such was true, such portion of the act would be unconstitutional.

In line with the authorities heretofore cited we must give a construction to the law in question rendering it constitutional, if at all possible. We firmly believe it was the intent of the Legislature to provide compensation for circuit clerks acting as parole commissioner in all third class counties. This intent must be followed even if it necessitates the strict letter of the act yielding thereto.

CONCLUSION

In the premises, it is the opinion of this department that under S.C.S.S.B. No. 227 the Circuit Clerk of Clay County is required to perform the additional duties as ex officio parole

Honorable Robert G. Kirkland

commissioner, and for the performance of said duties he is entitled to receive the maximum compensation provided for in the act for third class counties.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:ml

ABORTION: Unlawful to perform abortion on pregnant woman who has contracted German measles unless necessary
CRIMINAL LAW: to preserve the life of woman or life of unborn child.

FILED
49

May 14, 1952

5-15-52

Honorable Milton B. Kirby
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

> "During the past several weeks, Greene County has suffered an epidemic of German measles. Numerous cases are reported of prospective mothers in the early stages of pregnancy who have contracted the disease. Local medical authorities report that reliable medical statistics indicate that in cases during the early stages of pregnancy in which the mother suffers from German measles that the child when born, in a large majority of cases, will be mentally deficient or otherwise deformed.
>
> "A question is submitted as to whether or not a therapeutic abortion in such a case would be a violation of Section 559.100, Missouri Revised Statutes of 1949. Your early reply to this question is urgently requested and will be greatly appreciated by this office."

Section 559.100, RSMo 1949, provides as follows:

"Any person who, with intent to produce

> or promote a miscarriage or abortion, advises, gives, sells or administers to a woman (whether actually pregnant or not), or who, with such intent, procures or causes her to take, any drug, medicine or article, or uses upon her, or advises to or for her the use of, any instrument or other method or device to produce a miscarriage or abortion (unless the same is necessary to preserve her life or that of an unborn child, or if such person is not a duly licensed physician, unless the said act has been advised by a duly licensed physician to be necessary for such a purpose), shall, in event of the death of said woman, or any quick child, whereof she may be pregnant, being thereby occasioned, upon conviction be adjudged guilty of manslaughter, and punished accordingly; and in case no such death ensue, such person shall be guilty of the felony of abortion, and upon conviction be punished by imprisonment in the penitentiary not less than three years nor more than five years, or by imprisonment in jail nor exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment; and any practitioner of medicine or surgery, upon conviction of any such offense, as is above defined, shall be subject to have his license or authority to practice his profession as physician or surgeon in the state of Missouri revoked by the state board of medical examiners in its discretion."

In the case of State v. Gunther, 169 S.W.2d 404, l.c. 406, the Supreme Court of Missouri said:

> "It was also in evidence that appellant had agreed to perform the abortion before she had seen Mrs. Powell. In other words, the health of Mrs. Powell or that of the unborn child was not considered by either appellant or the

> Powells. Appellant's only concern was the $35 for which she agreed to perform the illegal operation. We deem the evidence sufficient as to the state of health of Mrs. Powell."

In the case of State v. Fitzgerald, 174 S.W.2d 211, the Supreme Court said l.c. 213:

> "With this assumption it is unquestionably the rule in this state that the burden is upon the state in this type case to prove the negative, that is the non-necessity of the operation to save the life of the mother or of the unborn child. The two State v. Smith cases, supra. However, our mere recital of the evidence demonstrates that the state did make a prima facie showing of the non-necessity of any such operation. Both lay and professional witnesses stated that Maude was a healthy girl and that they found no condition making such treatment advisable, or necessary, and Maude said that no physician had advised an abortion as necessary for any reason. There was no evidence to the contrary and neither the appellant nor anyone else claimed such an operation was necessary. The appellant only claimed that he did not perform the operation. Under such circumstances the state's evidence sufficiently proved the non-necessity of the operation (State v. Gunther, Mo. Sup., 169 S.W.2d 404; State v. Anderson, 298 Mo. 382, 250 S.W. 68; State v. Hawkins, Mo. Sup., 210 S.W. 4), and the case is unlike the Smith cases and State v. DeGroat in this respect, where there was no substantial evidence of the non-necessity of the operation or where there was evidence from which the jury could reasonably find the operation was necessary for the health of the mother or the unborn child, consequently the appellant's demurrers were properly overruled."

From the plain, clear and unequivocal language of the statute, supra, and its reiteration by the Supreme Court of this state in the Gunther and Fitzgerald cases, supra, the only justification for the production of an abortion is that the abortion is required to preserve the life of the woman or that of an unborn child.

Under such statute the fact that it may be thought that a child born to a mother who has had German measles during early pregnancy may be mentally deficient or deformed does not afford any justification for an abortion to be performed on such woman.

CONCLUSION

It is the opinion of this department that Section 559.100, RSMo 1949, makes illegal the performance of an abortion on a woman who has contracted German measles in the early stages of pregnancy unless such abortion is necessary for the preservation of the life of the woman or that of her unborn child.

Respectfully submitted,

C. B. BURNS, JR.,
Assistant Attorney General

APPROVED:

AOK

J. E. TAYLOR
Attorney General

CBB:lrt

MUNICIPALITIES: The City of Springfield may install parking meters on streets bounding the Greene County Courthouse.

FILED
49

September 10, 1952

9-10-52

Honorable Milton B. Kirby
Prosecuting Attorney of
Greene County
Springfield, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department. Your request reads as follows:

> "The City Council of Springfield, Missouri by a recent ordinance has installed parking meters on two sides of the Greene County Court House. The street on one side of the Court House is in the designated business district of the city of Springfield. The other street on which parking meters are installed is not in the designated business district. It is contended by the County Court that parking access on these two sides of the Court House is essential to the citizens of the county for transacting Court House business.
>
> "The County Court of Greene County has protested the installation of parking meters surrounding the Court House. The fact is undisputed that these areas so regulated are primarily used by persons transacting business in the Court House and the county offices, such as the payment of taxes, attendance at Circuit Court, the submission of assessment lists to the County Assessor, and the recording of legal instruments in the office of the Recorder of Deeds.

> "The question which we desire to submit is whether or not a city of the second class has the power to regulate, by the installation of parking meters, parking meters in areas around a county Court House, but within the city limits which are primarily used for the transaction of business in the county offices."

A question very similar to the one you have submitted was passed upon by the Supreme Court of Missouri in the case of State ex rel. v. Mexico, 197 S.W. (2d) 301. It appears from the report of the case that the City of Mexico by ordinance established parking meter zones and provided for the use of parking meters therewith. Included in the zones were the streets surrounding land owned by the county and on which the county courthouse was located. The county court sought to prohibit the installation of parking meters upon land actually owned by the county but which was permitted to be used by the city for street purposes around the courthouse square. The Supreme Court held that by virtue of the police power delegated to the city they could install the controverted parking meters. The court in its opinion said:

> "Highways exist primarily for the purpose of travel and transportation, and parking thereon for any extended period is a privilege. 40 C.J.S., Highways, Section 233, p. 244. In 1812, it was stated in Rex v. Cross, 3 Campbell, 224, a case involving the parking of stage coaches on a street, that: 'No one can make a stable-yard of the King's highway.' The highways are subject to reasonable regulation and supervision by the State in the exercise of its police power. State v. Dixon, 335 Mo. 478, 481 (2), 73 S.W. (2d) 385, 387(2); Park Trans. Co. v. State Highway Comm., 332 Mo. 592, 599, 60 S.W. (2d) 388, 390(5). The State may delegate this power. 40 C.J.S., Highways, Sec. 232 p. 240; 25 Am. Jur., p. 544, Secs. 253-255."

* * * * * * * * * * * * * * * * * * * *

> "The State of Missouri has delegated to the City of Mexico as a city of the third class authority to prevent the obstruction of its sidewalks and streets by vehicles (Sec. 6952, R.S. 1939, Mo. R.S.A.) and, along with other cities of the State, specific authority to '* * *by ordinance, make additional rules of

the road or traffic regulations to meet their needs and traffic conditions; * * * regulate the parking of vehicles on streets by the installation of parking meters for limiting the time of parking and exacting a fee therefor or by the adoption of any other regulatory method that is reasonable and practical * * *.' Laws 1943, pages 659-661, amending Sec. 8395, R.S. 1939, Mo. R.S.A. Said Sec. 8395 is a part of Art. I of Chap. 45, R.S. 1939, Mo. R.S.A., Section 8366 thereof provides in part: 'This article shall be exclusively controlling on the * * * regulation * * * of motor vehicles, their use on the public highways' et cetera. And Sec. 8367, Id., entitled 'Definitions,' defines 'Highways' as: 'Any public thoroughfare for vehicles, including state roads, county roads and public streets, avenues, boulevards, parkways or alleys in any municipality.'

"The regulation of the parking of automobiles on its streets by a city is a valid exercise of the State's delegated police power. City of Clayton v. Nemours, 353 Mo. 61, 66(3), 182 S.W. (2d) 57, 59(4), appeal dismissed, 323 U.S. 684, 65 S. Ct. 560, 89 L. Ed. 554; City of Clayton v. Nemours, 237 Mo. App. 167, 180; 164 S.W. (2d) 935, 942(16); Nemours v. City of Clayton, 237 Mo. App. 497, 509, 175 S.W. (2d) 60, 65 (1, 2). This is also true of such regulation by means of parking meters. Wilhoit v. City of Springfield, 237 Mo. App. 775, 784, 786, 171 S.W. (2d) 95, 98(2, 9). Additional authorities are cited in Bowers v. City of Muskegon, 305 Mich. 676, 9 N.W. (2d) 889; Cassidy v. City of Waterbury, 130 Conn. 237, 33 A. 2d 142; Hickey v. Riley, Or., 162 P. 2d 372, 109 P. 2d 1069; Annotations, 130 A.L.R. 316; 108 A.L.R. 1152, 72 A.L.R. 299. The instant record presents no issue that the ordinance before us is aught but a valid exercise of the police power of the City of Mexico.

"As previously ruled in this State: The law of the road extends to all public highways, de jure or de facto, embracing ways on private property if used for public travel. The necessity for regulation inherent in the use permitted gives rise to and makes the police power applicable to private land when used as a de facto public highway. City of Clayton v. Nemours, 353 Mo. 61, 66(4), 182 S.W. 2d 57, 60(7-9); City of Clayton v. Nemours,

237 Mo. App. 167, 177 et seq., 164 S.W. (2d) 935, 940(11, 12, 13, 15, 16); Nemours v. City of Clayton, 237 Mo. App. 497, 509, 175 S.W. (2d) 60, 65. We need not repeat what is there stated. Counties have not been delegated authority to regulate traffic over city streets within their boundaries. We are cited to no authority, and our search has revealed none under the instant facts, taking land devoted to public use as a city street out of the police power delegated to cities because owned by a county. State ex rel. Jump v. Louisiana, Bowling Green & Ashley Gravel Road Co., 116 Mo. App. 175, 92 S.W. 153, the only authority cited by the County, is not on this issue."

Section 75.110 RSMo 1949, gives to cities of the second class the power by ordinance to regulate the use of streets. Said section provides in part as follows:

"To establish, open, vacate, alter, widen, extend, grade, improve, repair, construct, pave, repave, reconstruct and maintain, light, clean, oil and sprinkle all streets, avenues, boulevards, sidewalks, alleys, wharves, parks, public grounds and squares, bridges, viaducts, subways, tunnels, sewers and drains; and to regulate the use thereof; * * *."

Section 304.120 RSMo 1949, (referred to in the Mexico case, supra, as "Laws 1943, pages 659 to 661") gives to the City of Springfield specific authority to, by ordinance, regulate parking by the installation of parking meters. Said section provides in part as follows:

"Regulate the parking of vehicles on streets by the installation of parking meters for limiting the time of parking and exacting a fee therefor or by the adoption of any other regulatory method that is reasonable and practical and prohibit or control left-hand turns of vehicles; * * *."

We are of the opinion that principles of law laid down by the Supreme Court in the Mexico case are controlling on the question at hand and since the City of Springfield has lawful authority by Section 302.120 to regulate parking by the installation of parking meters they may do so in their discretion by ordinance on streets surrounding the city courthouse.

Honorable Milton B. Kirby

CONCLUSION

Therefore, it is the opinion of this department that the City of Springfield has the power in the exercise of delegating police power to install parking meters on streets bounding the Greene County Courthouse.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DDG:hr

COUNTY TREASURER: County treasurers of third class countie not entitled to reimbursement for clerical hire which is not indispensably necessary to the successful and efficient conduct of the office.

FILED
49

September 10, 1952

9-18-52

Honorable Robert G. Kirkland
Prosecuting Attorney of
Clay County
Liberty, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department which request reads as follows:

"The Treasurer of this county has requested this office to obtain from you your official opinion on the proposition set out in the following excerpt in her letter to me.

"'I have in my possession, the opinion of the Attorney General of Missouri dated December 10, 1947, addressed to L. M. Bywaters, then Prosecuting Attorney, to which there are attached three separate former opinions of the Attorney General.

"'It is my opinion I am entitled to reimbursement from the county necessary additional services rendered to my office which are reasonably beyond my ability to furnish, however, the opinion does not cover the situation when I was incapacitated by illness and unable to be at the office and out of my office for nine months, and found it necessary to hire someone to operate the office for which they were paid by me. I would like to know if I am entitled to reimbursement for this money which I paid out.'

> "Your opinion on this proposition would be appreciated as soon as convenient."

The precise question taken from your opinion request is whether or not a county treasurer of a county of the third class may be reimbursed by the county for moneys expended for clerical hire during a period when the treasurer was incapacitated due to illness and unable to attend the office.

A search of the statutes relative to the treasurer of such counties reveals no provision authorizing the appointment of deputies or clerical hire or the payment thereof by the county. In such case the general rule is that the deputies and assistants must look to the officer for their compensation. This rule is stated in the case of Alexander v. Stoddard County, 210 S.W. (2d) 107 as follows:

> "* * *'As a general rule compensation for services rendered by assistants, deputies, and other employees can be allowed directly to them or to their superiors only as authorized by law; and where no provision is made for the payment, or for the appointment or employment of deputies and assistants, the latter must look exclusively to their employers for compensation, and such employer cannot look to the county for reimbursement. * * *'"

There are certain noted exceptions to this general rule indicated by the case of Ewing v. Vernon County, 216 Mo. 681, and Rinehart v. Howell County, 348 Mo. 421, however, we do not believe that such decisions are controlling on the question at hand. These cases are based upon a construction of a particular statute and hold that by reasonable implication they permit the payment of some particular item of expense. In the Rinehart case the prosecuting attorney was allowed reimbursement for stenographic hire on the ground that it was an indispensable expense necessary to the successful and efficient conduct of his office. Of particular importance in the latter case, as distinguished from this case, is the fact that the prosecuting attorney was present and performed his duties insofar as possible and the stenographic hire was an additional expense.

From the facts that you have submitted it does not appear that the treasurer could not have performed the duties of the office had she been present and we presume that she continued to draw the compensation provided by law.

Honorable Robert G. Kirkland

The legislature has prescribed the duties of the county treasurer and provided a compensation which is presumably adequate for the duties performed. The fact that a duly elected treasurer, whether by choice or through necessity, does not attend the duties of the office but employs someone to discharge those duties in his stead, does not thereby create new duties which are not covered by the compensation provided by law for the office. In other words, such an outlay is not an indispensable expense necessary to the successful and efficient conduct of the office which has not already been provided for. Therefore, we believe that the general rule adopted by the Supreme Court in the Alexander case, supra, is here controlling and the treasurer cannot look to the county for reimbursement.

CONCLUSION

Therefore, it is the opinion of this department that a county treasurer of a county of the third class is not entitled to reimbursement for clerical hire during a period when such treasurer is incapacitated due to illness and unable to attend the duties of the office.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DDG:hr

COUNTY HEALTH CENTERS:

Subject to the provisions of the law a county may establish a county health center. Such county health center would have jurisdiction over and would function in all parts of the said county. Such jurisdiction and functions would not be affected by the fact that a portion of a city occupies a portion of this said county.

FILED
49

September 23, 1952
9/23/52

Honorable Robert G. Kirkland
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

> "There is a movement on foot in this county to establish a county health center. They have consulted me about some of the legal technicalities involved and these questions involve county officials and county government in Clay County. I would like to obtain your official opinion on the following propositions:
>
> "Clay County is a county of the third class. It contains within its boundaries a part of the city of Kansas City, Missouri. Would a Clay County health center, if established, have jurisdiction to perform all its functions and services within the boundaries of that part of Kansas City in Clay County on an equal basis with all parts of the county? Would any of the operations or functions of the Health Department of the City of Kansas City prevent a Clay County health center from operating within the boundaries of the city of Kansas City in Clay County? Would it be possible under the provisions of Chapter 205 of the Revised Statutes of Missouri, as amended, for a Clay County health center to be established in that

> part and by that part of Clay County outside of the boundaries of the city of Kansas City in Clay County? In other words, could a Clay County health center be set up and operated for only a part of the County of Clay, that is, that part outside of the city limits of Kansas City?"

Your first question is: Would a Clay County health center, if established, have jurisdiction to perform all its functions and services within the boundaries of Kansas City in Clay County on an equal basis with all parts of the county?

The procedure relating to the establishment of a county health center is set forth in Section 205.010, RSMo 1949. However, that section was amended by the Missouri Legislature in 1951, by House Bill No. 307, and appears as Section 205.010 in Vernon's Annotated Missouri Statutes. That section, as amended, reads as follows:

> "Any county, subject to the provisions of the constitution of the state of Missouri, may establish, maintain, manage and operate a public health center in the following manner: Whenever the county court shall be presented with a petition signed by at least ten per cent or more of the qualified voters of the county, as determined by the number of votes cast for governor at the preceding general election, asking that an annual tax not in excess of ten cents on each one hundred dollars of the assessed valuation of property in the county, be levied for the establishment, maintenance, management and operation of a county health center and the maintenance of the personnel required for operation of the health center, the county court shall submit the question to the qualified voters of the county at the next general election to be held in the county or at a special election called for the purpose, the county clerk giving notice, published once each week for two consecutive weeks prior to such election date, in one or

> more newspapers published in the county, if any such be published, and if not so published, by posting written or printed notices in each township of the county, fourteen days prior to the election date, which notices shall include the text of the petition and state the rate of tax to be levied annually thereafter upon the assessed property of the county."

From the above section it is clear that a county health center is to be upon a county-wide basis. For example, any qualified voter in the county may sign the petition addressed to the county court requesting the establishment of a health center. Any qualified voter in the county may vote at the election which determines whether such a health center shall be established. And if such health center is established then every taxpayer in the county will be taxed for the establishment of such health center. In other words, as we noted above, county health centers are clearly upon a county-wide basis and include all parts of a county.

Section 205.010, supra, is an absolute grant of power which would in no way be abridged or abrogated by the extension of a portion of a city into a portion of a county.

Furthermore, there is no reason why the extension of a portion of the city of Kansas City into a portion of Clay County would put Clay County in any different position with respect to that portion of the city of Kansas City that is in a portion of Clay County, than Clay County is in with respect to the city of Liberty, which is wholly within Clay County, as far as a county health center is concerned. And certainly no one would contend that if Clay County does establish a county health center, such health center would not function within the city limits of the city of Liberty.

We are all fairly familiar with the fact of the existence of several separate jurisdictions over the same geographical area. For example, the city of Liberty is an incorporated city with numerous powers peculiar to it alone and inviolate to it. But Clay County, in which the city of Liberty is wholly contained, has powers and jurisdictions over the area in which the city of Liberty is located, which are different than the powers and jurisdictions of the city of Liberty, but which are no less real. And likewise, with

Honorable Robert G. Kirkland

the jurisdiction of the state of Missouri over Clay County, and the city of Liberty, and of the Federal Government over all. A citizen of the city of Liberty is subject to the jurisdiction of that city, of Clay County, of the state of Missouri, and of the Federal Government of the United States. Each operates in its own sphere, according to its powers, without conflict with the others. Such we believe to be the case in the instant situation. Therefore, it is our opinion that a Clay County health center would have jurisdiction to perform its functions in all parts of Clay County, including that portion which is a portion of the city of Kansas City.

Your second question is: Would any of the operations or functions of the health department of the city of Kansas City prevent a Clay County health center from operating within the boundaries of the city of Kansas City in Clay County?

We believe, that on the basis of our comments above, the answer to this question is in the negative.

Your third question is: Could a Clay County health center be set up and operated for only a part of the county of Clay, that is that part outside of the city limits of Kansas City?

We believe that the answer to this question is likewise in the negative in view of our discussion above.

CONCLUSION

It is the opinion of this department that subject to the provisions of the law, a county may establish a county health center. Such county health center would have jurisdiction over and would function in all parts of the said county. Such jurisdiction and functions would not be affected by the fact that a portion of a city occupies a portion of this said county.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

C B B

J. E. TAYLOR
Attorney General

HPWab

PROSECUTING ATTORNEY,

FEE OF SPECIAL PROSECUTOR:

The fee provided by law for a special prosecutor must be taxed and paid as costs in all cases in which such an officer is employed.

January 25, 1952

Filed
52

FILED
52

Mr. Walter R. Lethem, Jr.
Prosecuting Attorney
Nodaway County
Maryville, Missouri

Dear Mr. Lethem:

We have given careful consideration to your request for an opinion, which request is as follows:

> "In a recent criminal case tried in our county, a Special Prosecuting Attorney was appointed under the provisions of M.R.S. 56.110. The reason that this was necessary was that before I took office as prosecuting attorney I had been appointed by the Court to represent this defendant and had done considerable work on his side of the case. The defendant was found guilty and sentenced to one year in the county jail. He has subsequently been released on parole and one of the provisions of his parole is that he pay the costs of the court action. Section 56.130 of the Statute provides that a special prosecutor shall receive a reasonable fee to be fixed by the Court and to be taxed and paid as other costs in criminal cases.
>
> "It now appears to me that it would be grossly unfair to this defendant to assess the fee of the special prosecutor against him when certainly it is a cost that was incurred through no action

> on the part of the defendant. However, in view of the wording of this statute, I would appreciate an opinion from your office as to whether or not this defendant should have added to the regular court costs the amount of the fee for the special prosecutor appointed under these circumstances."

Section 56.110, RSMo 1949, is as follows:

> "If the prosecuting attorney and assistant prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his office, or shall be related to the defendant in any criminal prosecution, either by blood or by marriage, the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause."

Section 56.130, RSMo 1949, is as follows:

> "The person thus appointed shall possess the same power and receive a reasonable fee for each case prosecuted to be fixed by the court and to be taxed and paid as other costs in criminal cases."

Section 56.130 is the revised version of Section 12950, R. S. Mo. 1939, which provided that a special prosecutor should "receive the same fees as the proper officer would if he were present." This clause became obsolete when the legislature placed prosecuting attorneys on a salary basis and directed the fees of such officers to be paid over to the county treasurer. A special prosecutor then could receive no pay for his services. State ex rel. v. Patterson et al., 152 Mo. App. 264. The legislature restored compensation in the passage of one of its revision bills in 1949, H.B. No. 2014, when Section 56.130 in its present form was enacted.

Mr.. Walter R. Lethem, Jr.

This section has never been construed by the courts. But a well-known principle of law is applicable to the question now under consideration. This rule was stated by the Supreme Court of Missouri in State ex rel. v. Board of Education, 294 Mo. 106. In the course of that opinion, at page 115, the court said; "It is also a cardinal rule that when the language is plain, there can be no construction because there is nothing to construe."

The wording of Section 56.130 seems to be entirely clear. Evidently the legislature intended to make the law apply to all cases alike. We are unable to see anything in the statute to justify the conclusion that an exception could be made. We see no way to read any such construction into the law.

CONCLUSION

It is the opinion of this office that the fee provided for a special prosecutor in Section 56.130, RSMo 1949, should be taxed and paid as costs in all cases in which such an officer is employed; that no exception should be made because of any circumstances surrounding the case.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Arrotney General

BAT/fh

INSURANCE: Amendment of Articles of General American Life Insurance Company.

FILED
52

February 5, 1952

2-5-52

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
State Office Building
Jefferson City, Missouri

Dear Sir:

Under date of February 2, 1952, you forwarded to this office a certified copy of proceedings of the General American Life Insurance Company in regard to the adoption of an Amended Charter and Articles of Incorporation increasing the authorized number of directors of said company from thirteen (13) to nineteen (19) persons, and empowering the Board of Directors to elect six (6) additional directors to serve until the annual meeting to be held in the year 1953.

It is the opinion of this office that such proceedings and the Amended Charter and Articles of Incorporation set forth therein are in accord with the provisions of Chapter 376, RSMo 1949, and not inconsistent with the constitution and laws of this State and of the United States.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:ba

INSURANCE: Amendment of Articles of Incorporation of Merchants Mutual Casualty Company.

February 14, 1952

FILED
57

2-14-52

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Mr. Leggett:

Pursuant to your request of recent date, the attached copies of proceedings of policyholders and directors of the Merchants Mutual Casualty Company have been reviewed.

It is the opinion of this office that the Amendment of Articles of Incorporation of Merchants Mutual Casualty Company, evidenced by the attached copies of proceedings of policyholders and directors of said company, by which the name of said corporation is changed to American Mutual Casualty Company, is in accordance with provisions contained in Section 379.205 to Section 379.310, RSMo 1949, and is not inconsistent with the Constitution and laws of this State and the United States.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:ba

INSURANCE: Amendment of Articles of Incorporation of Insurance Company of St. Louis, Missouri

February 18, 1952

FILED
52

2-18-52

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Mr. Leggett:

The attached certificate of amendment disclosing proceedings had by the Board of Directors and Stockholders of Insurance Company of St. Louis, whereby the general purposes and powers of such insurance company have been amended and restated have been examined pursuant to your request.

It is the opinion of this office that the amendment of the Articles of Incorporation of Insurance Company of St. Louis, as evidenced by the attached certificate of amendment, is in accordance with the provisions of Sections 379.010 to 379.160, RSMO 1949, and is not inconsistent with the Constitution and laws of this State and of the United States.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:ba

INSURANCE: Amendment of Articles of Incorporation of the Postal Life and Casualty Insurance Company.

February 18, 1952

FILED
52

2-18-52

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Mr. Leggett:

Receipt is acknowledged of your letter of February 14, in which you enclosed three copies of proceedings of the Board of Directors and proceedings of the Stockholders of the Postal Life and Casualty Insurance Company, such proceedings authorizing an increase in capital stock of said corporation from $300,000 to $500,000.

Upon review of attached copies of proceedings of the Board of Directors and proceedings of the Stockholders of the Postal Life and Casualty Insurance Company, it is the opinion of this office that such proceedings are in accordance with the provisions of Chapter 376, RSMo 1949, and not inconsistent with the Constitution and laws of this state and the United States.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:ba

INSURANCE: Amendment of Articles of St. Louis Fire and Marine Insurance Company.

February 18, 1952



2-18-52

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Mr. Leggett:

The attached certificate of amendment disclosing proceedings had by the Board of Directors and Stock holders of the St. Louis Fire and Marine Insurance Company whereby the general purposes and powers of such insurance company have been amended and restated have been examined pursuant to your request.

It is the opinion of this office that the amendment of the Articles of Incorporation of the St. Louis Fire and Marine Insurance Company, as evidenced by the attached certificate of amendment, is in accordance with the provisions of Sections 379.010 to 379.160, RSMo 1949, and is not inconsistent with the Constitution and laws of this State and of the United States.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:ba

INSURANCE: Amendment of Articles of Incorporation of Central Mutual Casualty Company.

February 21, 1952

FILED
52

2-21-52

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Mr. Leggett:

Receipt is acknowledged of your letter of February 19, in which you transmitted three copies of proceedings of directors and policyholders of Central Mutual Casualty Company, held on January 22, 1952, such proceedings amending the Articles of Incorporation of said corporation so as to permit the writing of fire and allied lines of insurance under authority contained in Section 379.010, RSMo 1949.

The attached copies of proceedings have been examined and it is the opinion of this office that such proceedings amending the Articles of Incorporation of Central Mutual Casualty Company are in accordance with the provisions of Section 379.010, RSMo 1949, and Sections 379.205 to Section 379.310, RSMo 1949, and not inconsistent with the Constitution and laws of this state and of the United States.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:ba

INSURANCE: Amendment of Articles of Incorporation of Mid-Continent Casualty Company.

March 7, 1952

FILED
52

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Sir:

The attached certified copies of proceedings of the Board of Directors and Stockholders of the Mid-Continent Casualty Company forwarded to this office by your counsel's letter of February 26, 1952, disclose that amendments have been made to the Articles of Incorporation of Mid-Continent Casualty Company, an insurance company, organized and existing under Section 379.010 through Section 379.200, RSMo 1949, whereby said corporation increased its capital stock from fifty thousand (50,000) shares to one hundred thousand (100,000) shares and it is further determined that the par value of each share shall be reduced from five ($5) dollars to four ($4) dollars, the result being to increase the aggregate authorized capital from Two hundred fifty thousand ($250,000) dollars to Four hundred thousand ($400,000) dollars, and to amend Article Four (4) of its Articles of Incorporation in conformity therewith.

The documents mentioned aforesaid have been examined and found to be in accordance with the provisions of Section 379.010 to Section 379.200, RSMo 1949, and not inconsistent with the Constitution and laws of this state and the United States.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:ba

INSURANCE: Amendment of Articles of Incorporation of Washington Fire and Marine Insurance Company.

FILED
52

April 23, 1952

4-23-52

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Mr. Leggett:

The following opinion is rendered in reply to the request coming from your office on March 22, 1952, on which date this office was asked to render a formal opinion touching the regularity of proceedings of directors and stockholders of Washington Fire and Marine Insurance Company, held on February 15, 1952, and March 11, 1952, respectively. Such proceedings were had with a view to increasing the capital stock of Washington Fire and Marine Insurance Company from $500,000.00 to $1,000,000.00.

Upon a review of a certified copy of the proceedings, both of the stockholders' and directors' meetings, at which it was determined to increase the capital stock of Washington Fire and Marine Insurance Company from $500,000.00 to $1,000,000.00, it is the opinion of this office that such proceedings are in accordance with the provisions of Chapter 375 and Chapter 379 RSMo 1949, applicable to said company, and are not inconsistent with the constitution and laws of this State and of the United States.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO:lw

INSURANCE: Amendment of Articles of Incorporation of St. Louis Fire and Marine Insurance Company.

FILED
52

May 2, 1952 5-V-52

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Mr. Leggett:

Receipt is acknowledged of your Counsel's letter of May 1, 1952, in which was enclosed a certified copy of the proceedings of directors and stockholders of St. Louis Fire and Marine Insurance Company whereby said corporation seeks to amend its Articles of Incorporation by increasing its capital stock structure.

It is the opinion of this department that the proceedings of directors and stockholders of St. Louis Fire and Marine Insurance Company had on January 16, 1952 and April 16, 1952, respectively, are in accordance with Sections 379.010 to 379.160 RSMo 1949, and are not inconsistent with the Constitution and laws of this state and of the United States.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED

J. E. TAYLOR
Attorney General

JLO'M:lw

INSURANCE: Amendment of Articles of Incorporation of Atlas Mutual Insurance Company.

May 29, 1952

FILED
52

5-29-52

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Mr. Leggett:

Pursuant to your request of May 12, 1952, made through your assistant counsel, Mr. Bernard L. Cohen, this office has reviewed the proceedings had at the annual meeting of policyholders of Atlas Mutual Insurance Company held on January 8, 1951.

It is the opinion of this office that the proceedings of policyholders of Atlas Mutual Insurance Company held at their annual meeting on January 8, 1951, whereby the articles of incorporation of said company were amended, are in substantial compliance with the laws applicable thereto, found in Section 379.010 to Section 379.160, RSMo 1949, and are not inconsistent with the Constitution and Laws of Missouri and of the United States.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:lw

INSURANCE: Amendment of Articles of Incorporation of Transit Casualty Company.

FILED
52

July 8, 1952

7-9-52

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Sir:

The certified copy of proceedings of the board of directors and stockholders of Transit Casualty Company forwarded to this office by your counsel's letter of July 2, 1952, discloses that amendments have been made to the Articles of Incorporation of Transit Casualty Company, an insurance company organized and existing under Sections 379.010 to 379.200, RSMo, 1949, whereby said corporation increased its capital stock from its present amount of Five Hundred Thousand Dollars ($500,000.00) divided into fifty thousand (50,000) shares of the par value of Ten Dollars ($10.00) per share to One Million Dollars ($1,000,000) divided into one hundred thousand (100,000) shares of the par value of Ten Dollars ($10.00) per share, the entire amount of such increase to be fully paid up in cash by transferring Five Hundred Thousand Dollars ($500,000.00) from the surplus account of the Company to the stated capital account, and to amend Article IV of its Articles of Incorporation in conformity therewith.

The documents mentioned aforesaid have been examined and found to be in accordance with the provisions of Section 379.010 to Section 379.200, RSMo, 1949, and not inconsistent with the Constitution and laws of this state and the United States.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:lw

INSURANCE: Amendment of Articles of Incorporation of Washington Fire and Marine Insurance Company.

FILED
52

August 14, 1952

8-14-52

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Mr. Leggett:

The following opinion is rendered in reply to the request coming from your office on August 7, 1952, on which date this office was asked to render a formal opinion touching the regularity of proceedings of directors and stockholders of Washington Fire and Marine Insurance Company, held on July 18, 1952 and August 1, 1952, respectively. Such proceedings were had with a view to amending Section (3) of the Articles of Incorporation of said company by authorizing additional types of insurance coverage to be written by said company.

Upon a review of a certified copy of the proceedings, both of the directors' and stockholders' meetings, at which Section (3) of the Articles of Incorporation of Washington Fire and Marine Insurance Company was amended as outlined in said proceedings, it is the opinion of this office that such proceedings are in accordance with the provisions of Chapter 379, RSMo, 1949, applicable to said company, and are not inconsistent with the constitution and laws of this State and of the United States.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:lw

INSURANCE: Articles of Incorporation of Empire Casualty Insurance Company.

FILED
52

September 10, 1952

9-10-52

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Mr. Leggett:

This will acknowledge the transmission to this office of an executed copy of declaration of intention, and articles of incorporation of the proposed Empire Casualty Insurance Company, a stock insurance company to be formed under the provisions of sections 379.010 through section 379.200 RSMo 1949, with proof of publication of notice of such declaration as required by law.

The aforesaid documents have been examined pursuant to authority contained in section 379.065 RSMo 1949, and have been found to be in accordance with the provisions of sections 379.010 to 379.160 RSMo 1949, and not inconsistent with the constitution and laws of this state and of the United States.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:lw

INSURANCE: Amendment of Articles of Incorporation of National Home Life Assurance Company.

November 13, 1952

FILED
52

11/13/52

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Mr. Leggett:

Receipt is acknowledged of your assistant counsel's letter of November 10, 1952, in which was enclosed a certified copy of proceedings, both of the stockholders' and directors' meeting at which it was determined to increase the aggregate number of shares of stock which National Home Life Assurance Company of the City of St. Louis, State of Missouri shall have authority to issue from 200,000 to 500,000 of a par value of $1.00 each.

A review has been made of the proceedings referred to in the preceding paragraph, and it is the opinion of this department that such proceedings are in accordance with the provisions of Chapter 376 RSMo 1949, and are not inconsistent with the Constitution and laws of this state and the United States.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:lw

INSURANCE: Proposed Articles of Incorporation of Midland Mutual Insurance Company.

November 26, 1952

11/28/52

FILED
52

Honorable C. Lawrence Leggett
Superintendent
Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Mr. Leggett:

This office acknowledges receipt of your assistant counsel's letter of November 14, 1952, in which was forwarded a fully executed copy of Notice of Intention together with proof of publication of same, submitted to your office in connection with the formation of the proposed Midland Mutual Insurance Company.

A review has been made of the papers referred to in the preceding paragraph and it is the opinion of this office that the proof of publication of the Notice of Intention discloses on its face that Section 379.220 and 379.030 RSMo 1949, have not been complied with in the following respect. Section 379.220 RSMo 1949, specifically requires that the Notice of Intention be published as required by Section 379.030 RSMo 1949, and such latter section provides that the Notice of Intention be published in the county where such corporation is proposed to be located. The Notice of Intention discloses that the proposed corporation is to be located in Liberty, Clay County, Missouri, and the proof of publication discloses that publication of said Notice of Intention was had in Jackson County, Missouri. It should be further pointed out that the executed copy of the Notice of Intention discloses repitition on page 5 and 6 but that such repitition was not carried over in the proof of publication.

It is the opinion of this office that the Notice of Intention to form Midland Mutual Insurance Company,

Honorable C. Lawrence Leggett

together with proof of publication thereof, submitted to this office on November 14, 1952, are not in proper form to be the subject of the Attorney General's certificate required by Section 379.040, RSMo 1949.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:lw

INSURANCE: Articles of Incorporation of Old Security Life Insurance Company.

FILED
52

December 9, 1952

12-9-52

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Mr. Leggett:

This office acknowledges receipt of your assistant Counsel's letter of recent date transmitting an executed copy of declaration of intention of original incorporators to form a joint stock life insurance company under the applicable provisions of Chapter 376, RSMo. 1949, together with proof of publication of such declaration of intention as required by law. The name proposed for such company is Old Security Life Insurance Company.

The documents referred to in the preceding paragraph have been examined and it appears that Section 376.370, RSMo. 1949, has been inadvertently referred to, whereas a correct reference would have been to Section 376.670, RSMo. 1949. It is the opinion of this office that such reference is inconsequential when viewed in the light of the company being formed under applicable provisions of Chapter 376, RSMo. 1949, and such documents are found to be in accordance with the provisions of Chapter 376, RSMo. 1949, and not inconsistent with the Constitution and laws of this State, and of the United States.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:mw

INSURANCE: Articles of Incorporation of Midland Mutual Insurance Company.



December 23, 1952

12/23/52

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Sir:

This office acknowledges receipt of your letter of December 23, 1952 in which you inclosed executed Notice of Intention of original incorporators to form Midland Mutual Insurance Company, a corporation to carry on an insurance business under the specific provisions of Sections 379.205 to 379.310, RSMo, 1949.

Pursuant to authority contained in Section 379.040, RSMo, 1949, the Notice of Intention referred to in the preceding paragraph, together with proof of publication thereof, have been examined and are found to be in accordance with Sections 379.205 to 379.310, RSMo, 1949, and not inconsistent with the constitution and laws of this state and the United States.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:lw

MOTOR VEHICLES,)
)
)
REGISTRATION:)
)

The director of revenue may refuse registration of a motor vehicle dealer when it appears that the applicant is not in fact a dealer. He may suspend or revoke the registration of a dealer only in specific cases.

FILED
54

March 14, 1952

3-20-52

Mr. H. M. Long
Assistant Supervisor
Motor Vehicle Registration
State Capitol
Jefferson City, Missouri

Dear Mr. Long:

We have given careful consideration to your request for an opinion, which request is as follows:

> "We respectfully request an official opinion on what grounds if any, the Director of Revenue can revoke or suspend the registration of a Motor Vehicle Dealer.
>
> "Also, if he has authority to refuse registration if in his opinion, applicant does not qualify as a Motor Vehicle Dealer in fact. This Department is plagued with practices and violations by certain Dealers and we find the following: Namely, false affidavits and false certifications. We mean by false affidavit that in case of re-assignment of a motor vehicle by a Registered Dealer that in many instances some three or four months after such assignment, Application is made by affidavit for cancelling the re-assignment on the grounds that the sale was not completed, and in our investigation we find in altogether too many instances, the vehicle was used by the purchaser and returned as a trade in on another vehicle or the car was taken back by the Dealers as a repossession.

> "False certifications involve in most instances, new vehicles where the Franchised Dealer certifies an Application for Title and a Form 20 to an individual purchaser. Then in many instances this Application for Title and Form 20 are destroyed and another Application for Title and Form 20 are presented in the name of a Used Car Dealer, this operation being verified by investigation of this Department. We are holding some ten or twelve Applications for Titles in the name of a Used Car Dealer wherein our investigation indicates the vehicles to have been originally certified by the Franchised Dealer to individuals as purchaser."

The law pertaining to the registration of motor vehicle dealers is embodied in Section 301.250, RSMo 1949, which is as follows:

> "1. All manufacturers and dealers shall, instead of registering each motor vehicle manufactured or dealt in, make application upon a blank to be furnished by the director of revenue, for a distinctive number for all the motor vehicles owned or controlled by such manufacturer or dealer, said application to contain:
>
> "(1) A brief description of each type of motor vehicle manufactured or dealt in, including character of the motive power, amount thereof, stated in figures of horsepower; and
>
> "(2) The name and business address of such manufacturer or dealer;
>
> "3. The weight and rated live load capacity of commercial motor vehicles.

> "2. Fees and plates for manufacturers and dealers: On the payment of a registration fee of twenty-one dollars there shall be assigned to such manufacturer or dealer a certificate of registration in such form as the director of revenue shall prescribe, and two sets of number plates bearing such number. As many duplicate sets of number plates as may be desired may be obtained upon the payment of a fee of ten dollars and fifty cents for each duplicate set.
>
> "3. Display of duplicate number plates: Such duplicate number plates may be displayed on any motor vehicle used in the business of the manufacturer or dealer, but shall not be displayed on any motor vehicle or trailer used for the private purposes of any such manufacturer, dealer or their employees, or on any motor vehicle or trailer hired or loaned to others.
>
> "4. The director of revenue shall use all due diligence to ascertain whether applicant is a dealer in fact, and he may regulate the number of plates furnished each dealer."

It is herein provided that the director of revenue shall use all due diligence to determine whether an applicant is in fact a dealer. This means that the director may refuse registration if in his opinion the applicant is not qualified as a dealer under the definition contained in Section 301.010, RSMo 1949. This authority applies to all applications made by dealers, including applications for registration from year to year.

The director of revenue has authority under Section 301.-310, RSMo 1949, to suspend the registration of any owner who

neglects or refuses to apply for duplicate plates to replace ones found to be in such condition as to hinder or make difficult identification of the same. The director is also vested with authority under Section 301.430, RSMo 1949, to revoke the registration of any owner or dealer who has been convicted three times within a period of one year of a violation of any of the motor vehicle or traffic laws. These statutes cover specific cases only. We are unable to find any law giving the director of revenue any general power to suspend or revoke the registration of a motor vehicle dealer.

The registration of a dealer merely gives him the right to use a dealer's license plate on the cars operated in the course of his business. It does not authorize him to engage in the business of buying and selling automobiles. That right lies beyond the province of registration, and the revocation of his registration could not enjoin him from doing such business.

CONCLUSION

It is the opinion of this office that the director of revenue is authorized to refuse registration of a motor vehicle dealer when it appears that the applicant is not in fact a qualified dealer. It is also our opinion that the director of revenue may suspend or revoke the registration of a motor vehicle dealer only in specific cases described in Sections 301.310 and 301.430, RSMo 1949.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

BAT/fwh

PROBATE COURT:
RECORDS:

Justices of the peace records and probate court minute books may not be destroyed.

January 17, 1952

FILED
57

1-16-52

Honorable Aubrey R. Marshall, Judge
Probate and Magistrate Courts
Randolph County
Moberly, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this department which request reads in part as follows:

> "A great deal of the very limited space in our vault is taken up with minute books of the Probate Court and Justices of the Peace records.
>
> "In regard to the minute books of the Probate Court * * * might they be destroyed or stored in the basement of the court house at Huntsville, Mo., (preferably be destroyed.)
>
> "In regard to records of the Justices of the Peace. We have been unable to keep all of these in the vault but after the civil judgments have been transcripted to a record of the Magistrate Court shall we continue to keep them or as many of them as we can, in the vault? When, if ever, may they be destroyed?"

Laws of Missouri, 1945, page 765, Section 7, provided that at the expiration of their terms, all justices of the peace shall

deliver to the clerk of the magistrate court of their county all dockets, records and documents appertaining to their office. This law, as amended is now found in Section 482.070, RSMo 1949, which provides as follows:

> "The clerk of the magistrate court shall prepare and keep in a well-bound book an abstract and index of all unsatisfied judgments in civil cases appearing in the records of justices of the peace which have been delivered to him, and which were rendered at any time after the first day of January 1935. Such abstract and index shall show the names of the parties to each action in which the judgment was rendered, arranged so that the names of the parties in whose favor the judgment was rendered shall appear in alphabetical order, the date of the judgment, the amount thereof and an appropriate reference to the book or record where the record of such judgment may be found."

Said clerk of the magistrate court shall prepare and keep an abstract and index of all unsatisfied judgments in civil cases appearing in the records of justices of the peace which have been delivered to him. It is further noted that this section further provides that such abstracts and indexes shall contain appropriate references to the book of record where the record of such judgment may be found absent any specific provision authorizing a destruction of such documents. This provision indicates that such records shall be preserved. This conclusion is further exemplified by paragraph 2, of Section 482.070, RSMo 1949, requiring the county court to provide storage space for such records as follows:

> "The county court shall provide an adequate and safe storage place for the books and records of justices of the peace which shall be readily accessible to the magistrate court."

Section 109.150, RSMo 1949, provides that the county courts are authorized to destroy, after five years, certain designated papers. However, said section does not authorize the destruction of records in the possession of the magistrate court since the magistrate court is a court of record over which the county court would have no jurisdiction.

Section 476.010, RSMo 1949, provides that the judge of the probate court shall keep a record of the proceedings in said court. The judge or clerk of the probate court in making entries in the minute book is acting in his official capacity and therefore, such minute books would be deemed public records. We have been unable to find any provision authorizing the destruction of the records of courts of record such as minute books of the probate court. Therefore, we are of the opinion that such minute books shall be preserved. This rule is found in 45 Am. Jur., Records, Section 12, Page 425.

> "Public records and documents are the property of the state and not of the individual who happens, at the moment, to have them in his possession, and when they are deposited in the place designated for them by law, there they must remain, and can be removed only under authority of an act of the legislature and in the manner and for the purpose designated by law. The custodian of a public record cannot destroy it, deface it, or give it up without authority from the same source which required it to be made. * * *"

We find no provision which requires the probate court to keep its minute books in a vault. However, in preserving such records a safe storage space should be provided in order to secure their preservation.

It is the duty of the county to provide offices or space where such officers as the judge of the probate court may properly carry on and perform the duties and functions of their office, Section 49.510, RSMo 1949. We see no reason why storage space could not be provided any place within the court house where court is regularly held; provided, that such space is reasonably safe and under the supervision and control of the magistrate or probate court.

CONCLUSION

Therefore, it is the opinion of this department that the records of the justices of the peace delivered to the magistrate court and the minute books of the probate court, being public records, may not be destroyed, there being no authority for such destruction.

Honorable Aubrey R. Marshall

We are further of the opinion that the minute books of the probate court may be stored in the basement of the court house; provided, that such space shall be reasonably safe for the preservation of such records and under the supervision and control of the probate court.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DDG:hr

REGISTRATION OF PRIVATE DETECTIVE AGENCIES:

It is not necessary that private detective agencies register in the office of the Secretary of State, which agencies are operating in Kansas City, Missouri

FILED
57

August 15, 1952

8-15-52

Honorable J. Paul Markway, Chief Clerk
Office of Secretary of State
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

> "Section 319.010, R.S. Mo. 1949, provides that all private detective agencies in cities of 200,000 to 400,000 population must be registered in this office. There is only one city which fell in this classification -- Kansas City. According to the new census figures, Kansas City now has more than 400,000 inhabitants.
>
> "We respectfully request your opinion as to whether or not this statute still applies to Kansas City."

Section 319.010, RSMo 1949, to which you refer, reads:

> "It shall be unlawful for any person, firm or corporation to conduct, operate, manage or advertise the fact that they are engaged in the operation or management of any private detective agency or bureau in any city of this state having a population of two hundred thousand and less than four hundred thousand, unless they shall register their name and set forth in the application for registration thereof the names of all persons interested in the management and operation of any such private detective agency, which said registration shall be filed in the office of the secretary of state and a fee of two dollars shall be paid to the state collector of revenue. The secretary of state then

> shall issue a certificate showing such registration provided any such person, firm or corporation shall exhibit with said application for registration a tax receipt showing payment of taxes by any such person, firm or corporation for a period of at least five years prior to such application for registration. Thereupon it shall be the duty of any such applicant for license to present such certificate of registration to the board of police commissioners or other officials of said city for the right to license said business, provided they otherwise comply with the rules and regulations prescribed by said licensing authorities."

The above section is an exact copy of the law as passed by the Legislature in 1925. However, no appellate cases have been decided under it. From the language of the statute it appears to be perfectly plain that registration of detective agencies is confined to cities which have a population of between 200,000 and 400,000. Since Kansas City, Missouri, has a population in excess of 400,000, the above section would not apply.

CONCLUSION

It is the opinion of this department that it is not necessary that private detective agencies register in the office of the Secretary of State, which agencies are operating in Kansas City, Missouri.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HPWab

MAGISTRATE COURT COSTS: CRIMINAL CASES COLLECTIBLE FROM THE COUNTY COURT IN CERTAIN INSTANCES:

Magistrate fee in magistrate cases an information filed by prosecuting attorney where fine and costs are assessed against defendants of $2.50 allowed under Section 483.610, RSMo, 1949, is proper charge. $2.50 is proper charge to be collected from the county court on cost bill submitted under Section 550.030, RSMo, 1949. $2.50 cost collected in these criminal matters should be collected by magistrate and accounted for by him to the persons and in the ways mentioned in Section 483.615, RSMo, 1949.

FILED
57

September 4, 1952

9-5-52

Honorable Aubrey R. Marshall
Probate and Magistrate Judge
Moberly, Missouri

Dear Sir:

Upon reassignment your request has come to me for an opinion. Your request is stated as follows:

> "On information filed by the Prosecuting Attorney when the defendant is fined, say $25.00 and costs and cannot pay the fine he is committed to jail, serving full time;
>
> "And in case where defendant is sentenced to a certain number of days in jail and serves full time -
>
> "In each case the Magistrate Fee is $2.50, which heretofore this court has collected from the County Court on cost bill submitted. Is this $2.50 a proper charge against the County, or may this item be omitted from the fee bill submitted to the County?"

Section 483.610, RSMo, 1949, reads, in part, as follows:

> "2. In each criminal proceeding and in each preliminary hearing instituted in any magistrate court, a magistrate court fee of two dollars and fifty cents shall

> be allowed and collected to be in full for the services of the magistrate or the clerk of said court. Such fees shall be charged, collected and disposition thereof shall be made as provided by law applicable thereto."

It is our opinion that the above quoted part of the statute allows you to collect the $2.50 for services in full of the magistrate and clerk in each criminal proceeding.

Section 550.030, RSMo, 1949, reads as follows:

> "When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

This statute allows you to tax against and collect from the county upon proper cost bill the $2.50 mentioned heretofore, the same to be paid by the county court in the cases mentioned in your request. This should be done, and the amount collected by you, as the same has to be accounted for under Section 483.615, RSMo, 1949, which section provides as follows:

> " * * * *
>
> "2. Except as provided in section 483.620, it shall be the duty of each clerk of the magistrate court, with the approval of the magistrate to charge upon behalf of the state every fee that accrues in his office and to receive the same, and at the end of each month, pay over to the director of revenue all moneys collected by him as fees, taking two receipts therefor, one of which he shall immediately file with the state treasurer and shall at the end of each month make out an itemized and accurate list of all fees collected by him, or by the magistrate, giving the name of the person or persons paying the same, and turn the same over to the director of revenue, said report to be verified by affidavit.
>
> "3. On or before the thirty-first day of January of each year the clerk of the magistrate court shall file a verified report with the director of revenue showing all fees due and unpaid in his office in cases

> where the liability therefor has been finally determined and established during the preceding year, showing the name of the person or persons owing same and stating that he has been unable, after the exercise of diligence, to collect the same. The director of revenue shall collect such unpaid fees and shall have the same rights in connection with the judgment therefor as the prevailing party in the litigation.
>
> "4. All magistrate fees received by the director of revenue shall be deposited by him with the state treasurer in a special fund to be denominated 'magistrate fund', and all moneys in said fund shall be used exclusively for the payment of salaries of magistrates, their clerks, deputies and employees and for the payment of the cost of any surety bonds furnished by a clerk or deputy clerk; provided, however, that such salaries may also be paid from the general revenue of the state whenever either the balance in the magistrate fund or the appropriation from such fund is insufficient to pay such salaries."

Our opinion is that the above quoted sections of this statute make it imperative that you pay over to the persons named therein, in the ways stated, all $2.50 fees collected by virtue of Section 550.030, supra. As you see, the fees collected from the county in these matters are not payable by you back into the county treasury.

CONCLUSION

It is therefore the opinion of this department that:

(1.) In magistrate cases an information filed by the prosecuting attorney where the defendant is fined and assessed costs; cannot pay same and is committed to jail, the magistrate's fee of $2.50 provided for under Section 483.610, supra, is a proper charge.

(2.) The $2.50 mentioned in (1) above is a proper charge to be collected from the county court on cost bill submitted under Section 550.030, RSMo, 1949.

(3) The $2.50 costs collected in criminal matters by the magistrate should be accounted for by him to the persons and in the ways mentioned in Section 483.615, RSMo, 1949.

Respectfully submitted,

A. BERTRAM ELAM
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SANITY HEARINGS:
PROSECUTING ATTORNEYS: It is improper for a prosecuting attorney to represent, at a sanity hearing held within his county, the person whose sanity is the subject of inquiry; also, it is improper for a prosecuting attorney to represent, in his private capacity, an informant in a sanity hearing, but it is the duty of a prosecuting attorney to represent the state and/or county at all sanity hearings held within his county.

FILED
59

January 7, 1952

1-9-52

Honorable Roy W. McGhee, Jr.
Prosecuting Attorney
Wayne County
Greenville, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

> "I would appreciate an opinion from your office relative to the duties of the prosecuting attorney, if any, in a sanity hearing conducted by virtue of Section 458.020, R.S.Mo. 1949.
>
> "Is it proper for the prosecuting attorney to act as attorney for either informant or informee in such hearing, and charge a fee for said services?"

In response to our request that you further enlighten us regarding the meaning of the word "informee" as used by you in your letter quoted above, you have written us as follows:

> "The word 'informee' first came before my eyes in either the Missouri Digest, the Mo. R.S.A., or one of the cases cited therein, and I confess I thought it a bit unusual myself.
>
> "In order to clarify matters, let us change it to read 'the alleged insane person.' Your assumption was, of course, correct."

Section 458.020, RSMo 1949, to which you refer above, states:

> "If information in writing, verified by the informant on his best information and belief, be given to the probate court that any person in its county is an idiot, lunatic or person of unsound mind, and incapable of managing his affairs, and praying that an inquiry thereinto be had, the court, if satisfied there is good cause for the exercise of its jurisdiction, shall cause the facts to be inquired into by a jury; provided, that if neither the party giving the information in writing, nor the party whose sanity is being inquired into call for or demand a jury, then the facts may be inquired into by the court sitting as a jury."

We would also direct your attention to Section 458.040, RSMo 1949, which states:

> "Whenever any judge of the county court, magistrate, sheriff, coroner or constable shall discover any persons, resident of his county, to be of unsound mind, as in section 458.020 mentioned, it shall be his duty to make application to the probate court for the exercise of its jurisdiction; and thereupon the like proceedings shall be had as in the case of information by unofficial persons."

In response to your question, we would first point out that a sanity hearing, such as is provided for by Section 458.020, supra, is a proceeding by the state, and that it is a civil suit.

In this regard the court, in the case of State vs. Holtkamp, 51 S.W. (2d) 13, l.c. 19, stated:

> "* * * A lunacy proceeding is a civil, as distinguished from a criminal proceeding; yet it is a proceeding in personam by the state; the public is interested in the welfare of the person alleged to be insane. 32 C.J. 627-634; State ex rel. v. Guinotte, 257 Mo. loc. cit. 11, 14, 165 S.W. 718, 51 L.R.A. (N.S.) 1191, Ann. Cas. 1915D, 658. * * *"

In the case of State vs. Skinker, 126 S.W. (2d) 1156, l.c. 1161, the court stated:

> "* * * But it is also true that in these lunacy proceedings, the state, as parens patriae,- the community, -society,- has an interest, both to protect the insane person and to protect the public from possible injury and to the end that such person may not, through mental incapacity, waste his estate and become a charge upon the public. See State ex rel. Paxton v. Guinotte, 257 Mo. 1, 165 S.W. 718, 51 L.R.A., N.S., 1191, Ann. Cas. 1915D, 658. * * *"

In the case of State ex rel. v. Guinotte, 257 Mo. 1, l.c. 11, the court stated:

> "* * * Who are the parties in interest in an inquest de lunatico under our statute? Manifestly, (a) the public at large, that it may not suffer in person or property from the dangerous vagaries or mania of the individual alleged to be of unsound mind, and for that such person by a dissipation of his property, may not become a charge upon the public purse, * * *"

We would next direct your attention to the following portion of Section 56.060, RSMo 1949, which section pertains to the duties of prosecuting attorneys:

> "The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, * * *"

We also direct your attention to Sections 56.070, 56.080, and 56.090, RSMo 1949, which state:

> "56.070. To represent county, civil suits etc. - He shall prosecute or defend, as the case may require, all civil

suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before the magistrate courts, when the state is made a party thereto; provided, county courts of any county in this state owning swamp or overflowed lands may employ special counsel or attorneys to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties for the recovery or preservation of any or all of said swamp or overflowed lands, and quieting the title of the said county or counties thereto, and to pay such special counsel or attorneys reasonable compensation for their services, to be paid out of any funds arising from the sale of said swamp or overflowed lands, or out of the general revenue fund of said county or counties."

"56.080. Duties-habeas corpus.- In all criminal cases where any person or persons are brought up on writs of habeas corpus before a judge of any court of record, it shall be the duty of such attorney to attend upon the hearing of such application on behalf of the state."

"56.090. Must be present, when.- No magistrate or judge of a court of record having jurisdiction shall allow any such cases as are alluded to in sections 56.070 and 56.080 to be tried before him, unless the prosecuting attorney shall be present, or some one properly qualified to prosecute for him; and it shall be the duty of any magistrate, before trying such cases as are alluded to in sections 56.070 and 56.080, to give due notice to the prosecuting attorney."

It will be noted that we have held above that a sanity hearing is a civil proceeding by the state. It will also be noted that Section 56.060, supra, requires the prosecuting attorney to commence and prosecute all civil actions in their respective counties in which the county or state may be concerned. And that Section 56.070, supra, requires the prosecuting attorney to prosecute or defend, as the case may require, all civil suits in which the county is interested.

In regard to the above quoted portion of Section 56.070, we may here note that while the section uses the word "county" and omits the word "state", in contradistinction to Section 56.060, which uses the words "state" and "county", that the courts have construed Section 56.070 as referring to the state as well as to the county, although the word "state" is omitted from the section. In the case of State ex rel. v. Wurdeman, 183 Mo. App. 28, the court had occasion to construe Section 1007, R.S. Mo. 1909, which section is identical with Section 56.070, supra. After quoting Section 1007, the court stated, l.c. 34:

> "It is to be observed that section 1007, above copied, makes it the duty of the prosecuting attorney to defend all suits against the State or county, and, indeed, it is conceded in the instant case that, if the mandamus proceeding in the circuit court against the three judges of the county court were a suit against the county, no one could deny or gainsay the right of the prosecuting attorney to control and manage the defense there. * * *"

(Underscoring, ours.)

We feel, too, that our position that when Section 56.070, supra, uses the word "county" it also means "state", in view of the fact that a county is a legal subdivision of the state, being made so by Article VI, Sec. 1, of the Constitution of Missouri, 1945, which states:

> "The existing counties are hereby recognized as legal subdivisions of the state."

It will also be noted that Section 56.090, supra, prohibits any judge of a court of record from permitting any case coming within the provisions of Section 56.070 being heard before him

unless the prosecuting attorney or his representative shall be present. We also note that a probate court is a court of record, being made so by Article V, Section 17, of the Constitution of Missouri.

From all of the above, we feel that it is abundantly clear that it is the duty of the prosecuting attorney to attend and participate in, on behalf of the state and/or county, all civil suits arising in his county, in which the state or county is interested or concerned. That the state is interested and concerned in a sanity hearing has been affirmed by the courts in the cases of State v. Holtkamp, State v. Skinker, and State v. Guinotte, supra.

That the county in which the sanity hearing is held is also interested and concerned, seems obvious. It will be recalled that in the Holtkamp case the court stated that a sanity hearing was one in which "the public is interested"; that the Skinker case stated that a sanity hearing was one in which the "community, society" had an interest; and that the Guinotte case held that the "public at large" was interested in such a case. Certainly the county in which a sanity hearing was held would be included in the embracing words "the public, the community, society, the public at large."

Furthermore, the county in which a sanity hearing is held has a very practical and material interest and concern in such a hearing. Section 458.080, RSMo 1949, states:

> "When any person shall be found to be insane according to the preceding provisions, the costs of the proceedings shall be paid out of his estate, or if that be insufficient, by the county."

This section means that if, at a sanity hearing, the person whose sanity is in question is found to be insane, the costs of such hearing shall be paid by the county if the estate of the insane person shall be found insufficient to pay such costs. And in every sanity hearing that is ever held, the county may be required to pay the costs. The law provides (Section 458.080, supra) that if the person is found to be insane the costs of the hearing shall be paid out of his estate if the estate be sufficient for that purpose, but in no case is it ever positively known, until after the sanity hearing, whether or not the estate is sufficient to pay the costs of the hearing. Section 458.090, RSMo 1949, states:

> "If the person alleged to be insane shall be discharged, the cost shall be paid by the person at whose instance the proceeding is had, unless said person be an officer, acting officially according to the provisions of this chapter, in which case the costs shall be paid by the county."

This section means, in part, that if a sanity hearing is held at the instigation of a private individual, and that if at the hearing the person whose sanity is the subject of inquiry is found to be sane, that the costs of the hearing shall be paid by the person at whose request the hearing was held. But here again, it is impossible to know, prior to the hearing, whether the person who instigated the hearing has sufficient resources with which to pay the costs of the hearing if they be adjudged against him, because the law nowhere gives the probate judge the power, prior to a sanity hearing, to require the informant to make proof of his financial security or to deposit in escrow a sum sufficient to cover the costs of such a hearing.

Section 458.090 also provides that when the informant is an "officer," which, by Section 458.040, supra, means any judge of the county court, a magistrate, a sheriff, coroner, or constable, and at the hearing the person informed against is found to be sane, that the county shall pay the costs of the hearing.

Reverting again to the Skinker case, supra, we find the court saying that:

> "The state, the county society has an interest * * * to the end that such person may not, through mental incapacity, waste his estate and become a charge upon the public."

And the Guinotte case, supra, affirms, in answer to the question as to who are the parties in interest in a sanity hearing, that one such party manifestly is "the public at large, that it may not suffer in . . . property . . . for that such person by a dissipation of his property may not become a charge upon the public purse." Both cases also affirm the interest of "the public" to the end that it not suffer from the "vagaries" of an insane person, and that the insane person himself may not suffer.

We could further extend this line of reasoning by pointing out that Section 56.070, supra, requires the prosecuting attorney

to give his opinion, in matters of law in which the county is interested, to the county court or to any judge thereof; that if a county judge, acting in his official capacity, is the informant in a sanity hearing, which is a matter of law in which the county is interested, and called upon the prosecuting attorney for his opinion in regard to that particular matter, which he has a right to do and which the prosecuting attorney is obliged to give, and that if the prosecuting attorney were engaged in his private capacity in representing the person whose sanity was the subject of inquiry, that the prosecuting attorney would be put in the anomalous position of having to represent two possibly conflicting interests, i.e., the interest of the county and the interest of the person who was the subject of the sanity hearing. Neither must we lose sight of the obligation of the prosecuting attorney, as stated in Section 56.070, supra, to "represent generally the county in all matters of law."

From the above, we arrive at the conclusion that it is not proper for a prosecuting attorney to represent, at a sanity hearing, the person whose sanity is the subject of inquiry, because it is the duty of the prosecuting attorney to represent the state and/or county in all matters in which the state and/or county is interested and concerned, and because the state and/or county is interested and concerned in a sanity hearing, for the reasons set forth above.

Since it is the duty of a prosecuting attorney to represent the state and/or county at all sanity hearings held within his county, it follows that it would not be proper for a prosecuting attorney to represent a private informant in his, the prosecuting attorney's, private capacity. To the extent, whatever it may be, that a private informant is identified with the state and/or county in a sanity hearing, it may perhaps be said that the prosecuting attorney does represent such private informant. When the informant is any one of the "officers" enumerated above it might more nearly be said that the prosecuting attorney did represent, in his official, not in his private capacity, such informant.

Although we do not feel that a close construction of the law is necessary in order to exclude a prosecuting attorney from privately representing an informant or a person informed against in a sanity hearing since it appears to us to be clear, under the law, that he should not do so, yet we do feel that if a close construction was necessary in order to arrive at

this conclusion that such close construction should be made, since much evil can ensue to the public when a prosecuting attorney departs from the broad duties of his office to represent private interests which are, or which may be, inimical to the interest of the public which the prosecuting attorney is in duty bound to serve.

We will here note that on December 28, 1937, this department rendered an opinion to Honorable Alvin H. Juergensmeyer, Prosecuting Attorney of Warren County, which opinion held: "The prosecuting attorney of a county containing a population of less than 100,000 cannot be appointed by the county court to represent insane persons in a sanity hearing."

At the time when the above opinion was written, sanity hearings were held before the county court. The conclusion of the above opinion was based upon the theory that for a prosecuting attorney to represent an alleged insane person at a sanity hearing would result in a conflict of duties and would therefore be improper. We feel that, although sanity hearings are now held before the probate court, the same reasoning is applicable.

In an opinion rendered by this department on January 16, 1947, to Honorable Gordon J. Massey, Prosecuting Attorney of Christian County, this department held that it was improper for a prosecuting attorney to represent an indigent person at a sanity hearing because the county was liable to pay the costs of such hearing and that therefore the county had an interest in the proceedings.

CONCLUSION

It is the opinion of this department that it is improper for a prosecuting attorney to represent, at a sanity hearing held within his county, the person whose sanity is the subject of inquiry.

It is the further opinion of this department that it is improper for a prosecuting attorney to represent, in his private capacity, an informant in a sanity hearing, but that it is the duty of a prosecuting attorney to represent the state and/or county at all sanity hearings held within his county.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR, Attorney General

HPWab

TAXATION:
RETAIL DEALER IN NEW AUTOMOBILES A MERCHANT:
AUTOMOBILES TAXABLE:

Retail dealer in new automobiles at fixed place of business, a merchant within meaning of Section 150.010, RSMo 1949, for tax purposes, and new automobiles are "merchandise" Not being exempt under any statutes, said automobiles are liable for taxation. Duty of dealer to list stock of new automobiles in statement to county assessor, as provided by Section 150.050, RSMo 1949.

FILED
59

February 6, 1952 2/19/52

Honorable Roy W. McGhee, Jr.
Prosecuting Attorney
Greenville, Missouri

Dear Sir:

Your request for a legal opinion of this department has been received, which reads as follows:

> "re: Applicability of Section 150.050, R.S. Mo. 1949, to retail automobile dealers.
>
> "I would like an opinion on whether the above statute requires automobile dealers to include in their list of taxable property automobiles held by them for resale during the period prescribed by the statute, i.e., the highest number held by them between the first Monday in January and the first Monday in May (at any one time).
>
> "Apparently it has been the belief of the local dealers for some time that their stock of automobiles was exempt. I can find no authorization in the statutes for such exemption. Hence my letter to you.
>
> "My thanks for the many services rendered me by your office in the past."

In the case of State v. Union Electric Company, 220 S.W. (2d) 1, it was held that all property, except such as is specifically exempted by the Constitution and statutes, is subject to taxation. At l.c. 3, the court said:

> "* * * all property, except such as is specifically exempted by the Constitution and the statutes enacted pursuant thereto, is subject to taxation. State ex rel. Ziegenhein v. Mission Free School, 162 Mo. 332, 337, 62 S.W. 998, 999; 2 Cooley, Taxation, Secs. 550-551. 'It is the well-settled policy of our law that taxes shall be levied and collected for public purposes on all property within the territorial jurisdiction of the state, except that expressly enumerated as exempt' [316 Mo. 853, 293 S.W. 401] even though all such property must be subjected to the various specific taxes by law. State ex rel. Union Electric L. & P. Co. v. Baker, supra. In that case it was specifically held, as the statutes then and now plainly provide, that all the property of the Union Electric Light and Power Company, including all its distributable property, had been designated for and subjected to taxation, and, that there were no exemptions,--'and all property, real and tangible personal, owned by * * * electric power and light companies, * * * shall be subject to taxation for state, county, municipal and other local purposes to the same extent as the property of private persons.' Mo. R.S.A. § § 11295, 11280.1. The mere fact that distributable property, unlike the ordinary property of private persons, is assessed and apportioned by the State Tax Commission does not mean that such property is withdrawn from the county's taxing power."
>
> (Underscoring ours.)

Section 137.100, RSMo 1949, provides what property shall be exempt from taxation, and reads as follows:

> "Certain property exempt from taxes.--The following subjects shall be exempt from taxation for state, county or local purposes:
>
> "(1) Lands and other property belonging to this state;
>
> "(2) Lands and other property belonging to any city, county or other political subdivision in this state, including market houses, town halls and other public structures, with their furniture and equipments and on public squares and lots kept open for health, use or ornament;

> "(3) Lands or lots of ground granted by the United States or this state to any county, city or town, village or township, for the purpose of education, until disposed of to individuals by sale or lease;
>
> "(4) Nonprofit cemeteries;
>
> "(5) The real estate and tangible personal property which is used exclusively for agricultural or horticultural societies heretofore organized, or which may be hereafter organized in this state;
>
> "(6) All property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable, and not held for private or corporate profit shall be exempted from taxation for state, city, county, school, and local purposes; provided, however, that the exemption herein granted shall not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom be used wholly for religious, educational or charitable purposes."

It is readily seen that the new automobiles in the dealers' stock, referred to in your letter, do not fall within any of the classes of property exempt from taxation under the last quoted section of the statute.

Section 150.010, RSMo 1949, defines the term, "merchant", and reads as follows:

> "Every person, corporation, copartnership, or association of persons, who shall deal in the selling of goods, wares and merchandise at any store, stand or place occupied for that purpose, is declared to be a merchant. Every person, corporation, copartnership or association of persons doing business in this state who shall, as a practice in the conduct of such business, make or cause to be made any wholesale or retail sales of goods, wares and merchandise to any person, corporation, copartnership or association of persons, shall be deemed to be a merchant whether said sales be accommodation sales,

> whether they be made from a stock of goods on hand or by ordering goods from another source, and whether the subject of said sales be similar or different types of goods than the type, if any, regularly manufactured, processed or sold by said seller."

Under the provisions of Section 150.020, RSMo 1949, the term "merchant" is construed to mean all merchants, except physicians as to medicines used in their practice; and farmers as to the products raised and sold by them under Section 150.030.

Section 150.040, RSMo 1949, provides the amount of taxes to be paid by merchants and reads as follows:

> "Merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares and merchandise which they may have in their possession or under their control, whether owned by them or consigned to them for sale, at any time between the first Monday in January and the first Monday in April in each year; provided, that no commission merchant shall be required to pay any tax on any unmanufactured article, the growth or produce of this or any other state, which may have been consigned for sale, and in which he has no ownership or interest other than his commission."

Section 150.050 (1), RSMo 1949, provides the procedure to be followed by the merchant in listing merchandise in his statement of taxable property given to the assessor each year, and reads as follows:

> "On the first Monday in May, 1946, and on the same date each year thereafter, it shall be the duty of each person, corporation or copartnership or persons, as provided by sections 150.010 to 150.290, to furnish to the assessor of the county in which said license may have been granted, a statement of the greatest amount of goods, wares, and merchandise, which he or they may have had on hand at any one time between the first Monday in January and the first Monday in April next preceding; said statement shall include goods, wares, and merchandise owned by such merchant, and consigned to him or them for sale by other parties."

Automobiles offered for sale by an automobile dealer are merchandise within the meaning of the terms "goods, wares and merchandise" and such was the holding of the court in the cases of Associates Discount Corporation v. C. E. Fay Co., 30 N. E. (2d) 876, and Jeffery v. M. W. Leahy & Co., 155 N.E. 638. We quote from the first case (30 N.E. (2d) l.c. 880) as follows:

> "The so called factor's act, G.L. (Ter.Ed.) c. 104 in § 1, provides 'A factor or other agent intrusted with the possession of merchandise or of a bill of lading consigning merchandise to him with authority to sell the same shall be deemed the true owner of such merchandise, so far as to give validity to any bona fide contract of sale made by him.' One who is the so called trustee under a trust receipt, with authority to sell * * * * * is a 'factor or other agent' within that section. * * * * * Of course the automobile was 'merchandise.' * * * * * *"

It is assumed that the retail dealers referred to in the opinion request conduct their business at a building or other fixed place of business occupied for that purpose, and that, since their stock of goods, wares and merchandise consists of new automobiles, in the retail selling of which said dealers are engaged, it is our thought that for the purposes of taxation, said dealers are merchants within the meaning of Section 150.010, and that since new automobiles in such a dealer's stock of merchandise have never been declared exempt by any Missouri statutes, that said automobiles are liable for taxation, and that such dealers must follow the procedure provided in the above-mentioned statutes, particularly that in Section 150.050 (1), RSMo 1949, in reporting said automobiles to the county assessor for assessment.

CONCLUSION

It is therefore the opinion of this department that one engaged in the retail selling of new automobiles at a building or other fixed place occupied for that purpose is a merchant within the meaning of Section 150.010, RSMo 1949, defining the term, "merchant," for the purposes of taxation; that the new automobiles constituting such dealer's stock are goods, wares and merchandise within the meaning of said section, and, since

no Missouri statutes specifically exempt merchandise of this kind, said new automobiles are liable for taxation, and it is the duty of such retail automobile dealer to furnish the county assessor with a statement each year, showing the greatest number of new automobiles he may have had on hand at any one time between the first Monday in January and the first Monday in April, owned or consigned to him for sale, as provided by Section 150.050, RSMo 1949.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PNC:ba

FEES OF: CORONERS: STENOGRAPHERS IN MAGISTRATE COURT, HOMICIDE CASES:

Coroner can only be allowed and paid fees provided by Sec. 58.540 RSMo 1949 for writing down witnesses testimony at inquest; to be paid by county when estate of deceased person insufficient and no one liable or able to pay costs. Examining magistrate in homicide case may appoint stenographer to take down and certify testimony under Sec. 485.150 RSMo 1949. Stenographer to be allowed and paid only fees provided by section; fees taxed as costs and paid as other costs.

April 22, 1952

FILED
59

4-23-52

Honorable Roy W. McGhee, Jr.,
Prosecuting Attorney of
Wayne County
Greenville, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which reads in part as follows:

> "There has been some difficulty experienced by the County in determining what fees to allow (properly) to the stenographer employed from time to time on inquests and homicide preliminary examinations.
>
> "Accordingly, I have searched the statutes and found the following:
>
> (1) Section 58.540. Inquests: 10¢ @ 100 words.
> (2) Section 485.150. Court Reports and Stenographers. When called by the magistrate in homicide cases: 15¢ @ 100 words and figures.
> (3) Section 486.090. Notaries Public. For copies of records and papers; 15¢ @ 100 words.
> (4) Section 492.590. Depositions: (a) Attendance fee up to $3.00 per hour. (b) Transcription fee: 60¢ per 25-line page, 25¢ per 25-line

page for carbon copy.

> "Question: May the fees allowed by Section 590 by paid stenographers by the county for work at inquests and preliminary hearings, or do the provisions of Sections 58.540 and 485.150 remain in effect?"

Section 58.330, RSMo 1949, gives every coroner the power to issue his summons for witnesses, commanding them to appear before him at the inquests and to give testimony within their knowledge concerning the matter of inquiry.

Section 58.350, RSMo 1949, provides that the testimony of such witnesses shall be written down and subscribed by them and reads as follows:

> "The evidence of such witnesses shall be taken down in writing and subscribed by them, and if it relate to the trial of any person concerned in the death, then the coroner shall bind such witnesses, by recognizance, in a reasonable sum for their appearance before the court having criminal jurisdiction of the county where the felony appears to have been committed, at the next term thereof, there to give evidence; and he shall return to the same court the inquisition, written evidence and recognizance by him taken."

Section 58.540, RSMo 1949, provides the fee that shall be allowed the coroner for taking down the witnesses' testimony, and reads as follows:

> "For taking down the testimony at an inquest, the coroner shall be allowed ten cents for every hundred words, and twenty-five cents for certifying the same."

We have given careful consideration to the provisions of Sections 486.090, RSMo 1949, and 492.590, RSMo 1949, referred to in your letter, and since we are of the opinion that neither of said sections have any application or bearing upon the subject matter of inquiry, we find it unnecessary to discuss them further herein.

Section 544.370, RSMo 1949, requires the testimony given by witnesses before an examining magistrate in a homicide case to be reduced to writing by him or under his direction, and reads as follows:

> "In all cases of homicide, but in no other, the evidence given by the several witnesses shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses respectively."

Section 485.150, RSMo 1949, authorizes the examining magistrate in homicide cases to appoint a competent stenographer to take down such testimony in writing, and reads as follows:

> "Each magistrate may appoint a competent stenographer or reporter to write and certify evidence of witnesses in cases of homicide and such stenographer shall be allowed a fee of fifteen cents for every one hundred words and figures. Such fee shall be taxed as costs and paid as other costs in the case."

In answer to your inquiry, it is our thought that section 58.540, supra, is the only one which allows the coroner a fee for taking down the testimony of witnesses at an inquest, and that the coroner is limited to the fee provided by that section, and is not entitled to receive any other additional fee for his services. In those cases in which the county is liable for the payment of the costs of a coroner's inquest, the county court cannot legally allow, or order paid out of the county treasury, any other fees for the coroner's services in taking down the testimony of the witnesses at said inquests, than those provided by Section 58.540, supra.

In answer to your inquiry regarding the amount of fees which might be allowed and paid to a stenographer or reporter appointed by the examining magistrate in a homicide case for writing the testimony of the witnesses, it is our further thought that the appointment of such reporter is to be governed by the provisions of Section 485.150, supra. The fees are also fixed by this section, and the reporter cannot be allowed or paid any other, or different fees for his services than those provided therein, and such fees shall be taxed as costs, and paid as other costs in the case.

Honorable Roy W. McGhee, Jr.

CONCLUSION

It is therefore the opinion of this department that for taking down the testimony of witnesses in writing given at a coroner's inquest, the coroner can only be allowed and paid the fees provided by Section 58.540, RSMo 1949, and that the county shall be liable for the payment of said fees and other costs when the deceased person over whose body the inquest was held left no estate sufficient to pay said costs, or no person is liable or financially able to pay the costs of said inquest.

It is the further opinion of this department that when a magistrate appoints a stenographer to write and certify the testimony of witnesses given before such magistrate in a homicide case under the provisions of Section 485.150, RSMo 1949, said stenographer shall be allowed and paid only those fees for his services provided by said section, which fees shall be taxed as costs and paid as other costs in the case.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PNC:hr

PUBLIC BUILDINGS: A bid proposal which does not bid on the entire project advertised and which does not meet reasonable requirements is not a compliance with the advertisement and should be rejected.

BIDS:

FILED
59

October 10, 1952

10-14-52

Honorable Ralph McSweeney
Director
Division of Public Buildings
State of Missouri
Jefferson City, Missouri

Dear Mr. McSweeney:

This is in reply to your request for an opinion reading as follows:

> "On September 30, 1952, we opened bids for a food refrigeration, storage and processing building to be constructed at State Hospital No. 2, St, Joseph, Missouri.
>
> "Two addenda to the specifications were sent to all contractors who had requested the specifications. These were received by the said contractors about five days before the time for opening bids. One of the addenda provided for changes in the work to be done and also provided for extra cement and patch work. The other addenda provided generally that bidders should submit a statement indicating the proposed sub-contractors for the refrigeration equipment section of the work, together with a list of the manufacturers of the major items of equipment to be installed in that contract.
>
> "The low bidder failed to furnish a list of sub-contractors and a list of the manufacturers of the major items of equipment and further failed to indicate in his bid that he was bidding upon the addenda. Under these circumstances, was the low bid responsive to the advertisement for bids?

Honorable Ralph McSweeney:

> "I am sending you the complete file in the case so that you will have all the available information."

Section 8.250, RSMo 1949, provides for advertising for bids for construction of any building, improvement, alteration or repair, which exceeds the sum of Ten Thousand ($10,000.00) Dollars. The section further provides that:

> "* * * The number of such public bids shall not be restricted or curtailed, but shall be open to all persons complying with the terms upon which such bids are requested or solicited."

(Emphasis ours.)

The public policy of requirements for competitive bidding is set forth in Case vs. Inhabitants of Trenton, 74 A. 672, wherein the Court stated at l.c. 673:

> "We must consider the public policy which underlies the requirements of competitive bidding. The purpose of the statute requiring competitive bidding is that each bidder, actual or possible, shall be put upon the same footing. The municipal authorities should not be permitted to waive any substantial variance between the conditions under which bids are invited and the proposals submitted. If one bidder is relieved from conforming to the conditions which imposes some duty upon him, or lays the ground for holding him to a strict performance of his contract, that bidder is not contracting in fair competition with those bidders who propose to be bound by all the conditions. This is the policy which prevents the modification of specifications after bids have been presented, and the awarding of the contract to one of the bidders based upon such revised specifications."

The duties of public officials with relation to letting contracts upon competitive bidding are set out in Coller vs. City of Saint Paul, 26 N.W. (2d) 835, l.c. 840:

Honorable Ralph McSweeney:

> "Statutory and city charter provisions requiring competitive bidding in the letting of public contracts require, as necessary corollaries, that the public officials whose duty it is to let a contract should adopt definite plans and specifications with respect to the subject matter of the contract; that the plans and specifications be so framed as to permit free and open bidding by all interested parties; that a bid shall constitute a definite offer for the contract which can be accepted without further negotiations; and that the only function of the public authority with respect to bids after they have been received shall be to determine who is the lowest responsible bidder. (Citing cases) It necessarily follows also that a bid must conform substantially to the advertised plans and specifications, and that where there is a substantial variance between the bid and the plans and specifications it is the plain duty of the public authority to reject the bid."

There seems to be some indication in the case of Maryland Pavement Company vs. Mahool, 110 Md. 397, that a bidder who does not comply with the conditions of the specifications has no right to even have his bid considered by the authority making the award. In that case, the low bidder had not deposited a sample granite block. The Court held that requiring a sample was a reasonable condition and was inserted for the best interests and protection of the city.

Likewise, bids have been rejected because they did not conform to a reasonable requirement of the advertisement that a picture of the apparatus be furnished with the bid. (See: Hahn Motor Truck Corporation vs. Atlantic City, 140 A. 675.)

The standard form of bid proposal being used at the present by the State of Missouri contains the following:

> "1. The undersigned, having examined and being familiar with the local conditions affecting the construction of the work and

> with the drawings, the specifications (including the advertisement for bids, instructions to bidders, the bid forms, the form of bond, general conditions, special conditions, alternates, the form of contract and the detailed specifications and addendas, numbers ___ to _____ inclusive thereto) as prepared by _____ Architects, hereby proposes to furnish all labor, material, equipment and services required for the performance and completion, in a workmanlike manner, of all work to complete the new FOOD REFRIGERATION STORAGE & PROCESSING BUILDING at STATE HOSPITAL NO. 2, ST. JOSEPH, MISSOURI, all in accordance with the aforementioned documents for:
>
> "The sum of _____
> _____
> _____ DOLLARS ($_____)."

This paragraph is an integral part of the proposal, as it identifies the work upon which the contractor is bidding. The addenda are as important as the specifications. Often times, these addenda contain instructions and information as to extra or different work which will change considerably the amount of the contract. When a bidder leaves the addenda numbers blank he is not bidding upon the full project which has been advertised.

In this particular instance, an acceptance of the proposal of the low bidder would not be an acceptance of the project advertised and the addenda thereto. That the addenda were received by the low bidder is clearly evidenced by the registered return receipt.

Under these circumstances, we believe that the failure of the contractor to complete the bid proposal and the failure to submit the list of sub-contractors and manufacturers of equipment to be used is sufficient to justify denying to him the award of a contract. Section 8.250, supra, says that the right to bid shall be open to all persons "complying with the terms upon which such bids are requested or solicited."

It has been said that:

Honorable Ralph McSweeney:

> "A municipality which acquires a reputation for loose specifications and unjust discrimination in the enforcement of specified requirements suffers financial loss in decreased competitive bidding, even though there be not the slightest evidence of fraud, collusion, or dishonesty."

(Fraser vs. City of Buffalo, 210 N.Y. Sup. 548, 550.)

The rule of conformity of the proposal to reasonable requirements contained in an advertisement for bids and in the specifications is applied with greater strictness when challenged in the inception of the proceedings than after construction has been completed. (North View Land Co. vs. City of Cedar Rapids, 169 N.W. 644, 645.)

The requirement that the bidder furnish a list of subcontractors and the manufacturers of the equipment to be used in the building is a reasonable one and one which is designed to protect the state. If the officials charged with construction and equipment are enabled to determine the type of equipment a bidder proposes to use, they are then able to determine whether or not specifications have been complied with. In some instances there may be a misinterpretation of the requirements of the specifications, and it is considerably better to have such difficulties cleared up before a contract is entered into and work started on the project.

CONCLUSION

Therefore, it is the opinion of this department that a bid proposal which does not contain a bid on addenda to the specifications and which does not meet reasonable requirements is not a compliance with the advertisement for bids and is such a material variance that the bid should be rejected.

Respectfully submitted,

APPROVED:

JOHN R. BATY
Assistant Attorney General

J. E. TAYLOR
Attorney General

JRB:irk

PUBLIC BUILDINGS: Mere informalities in a bid proposal on public improvements may be waived when in the best interest of the state.

BIDS:

FILED
59

December 31, 1952

Mr. Ralph McSweeney, Director
Division of Public Buildings
Department of Revenue
Jefferson City, Missouri

Dear Sir:

This is in reply to your request for an official opinion which reads as follows:

> "On December 2, 1952, bids were opened for Completion of Infirmary and Reconstruction of Gardner Cottage at State Hospital No. 4, Farmington, Missouri. The low bidder was the Swan Construction Company of St. Louis, Missouri, with a combined base bid of $182,000.00. The next low bidder was the John B. Gutmann Construction Company of St. Louis, Missouri, with a combined base bid of $189,400.00.
>
> "The low bidder failed to submit the Bidder's Qualifications which was called for in the specifications. As a part of the specifications, it is provided that 'Failure to comply with this instruction may be regarded as justification for rejecting the contractor's proposal'. The low bidder also failed to indicate whether or not the amount bid on Alternate No. 3 was for a deduction or for an addition. The low bidder was immediately contacted by telephone, and the Architect was informed that the amount bid was an addition. However, even with this amount being an addition, the low bidder is still several thousand dollars below the next low bidder.
>
> "In the Advertisement for Bids, it is provided that 'The State reserves the right to reject any and all bids, and to waive all informalities in bids'. Also in the Instructions to Bidders, there is contained the following:

> 'The Owner, however, reserves the right to reject any and all bids and to waive all informalities in bids received whenever such rejection or waiver is in its interest'.
>
> "In order to take advantage of the low bid submitted by the Swan Construction Company, may the above discrepancies be considered as informalities which may be waived by the State?"

It will be seen that the provision requiring the submission of a form setting forth the Bidder's Qualifications does not state that failure to include the same will absolutely result in the rejection of a bid. It is further to be noted that the specifications forbid the withdrawal of any proposal for a period of 30 days after the specified time for receiving bids has passed. Therefore, it becomes clear that granting permission to the low bidder to furnish the Bidder's Qualifications form after the time for the opening of bids does not injure the State in any manner, and this is clearly so because if the low bidder is unable to qualify, the other bids are still in effect and the State is permitted under the specifications to accept one of the other proposals. We do not believe that this is a substantial variance which should automatically result in the rejection of the bid.

It is to be noted that the low bidder also failed to indicate whether or not the amount bid on an alternate was for a deduction or for an addition. In the particular set of facts now before us, we believe it was permissible to immediately correct this defect by immediate inquiry of the bidder as to his intention. It is obvious from the work stated under the alternate in question that the sum would have to be an addition in view of the substantial amounts bid by the other contracters. It is also to be noted, and we believe this very important in a consideration of this matter, that under no possible combination could any other bidder be lower than the Swan Construction Company.

In the specifications, there is a provision that the owner reserves the right to reject any and all bids and to waive any and all formalities in bids whenever such rejection or waiver is in its interest. The general rule on this subject is contained in 43 Am. Jur. at page 781, 782, and is as follows:

> "Generally, before a variation from the specifications will be deemed to destroy the competitive character of a bid for a public contract, the variation must be substantial, that is, it must affect the amount of the bid. It is sufficient if the bid conforms substantially to the advertisement. A slight or immaterial variance from the specifications and advertisements for bids for a public contract does not destroy the competitive character of the bid so as to require its rejection. A variation from the advertised specifications does not destroy the competitive character of a bid unless it affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by other bidders. There is no dispute about the rule itself; the practical question in the cases is whether there was substantial conformity or a material variance, and this is determined largely with reference to whether the bidder's proposal gives him an advantage or benefit which is not enjoyed by other bidders.
>
> * * * * * * *
>
> "A distinction may be made between the question whether a bid is so irresponsive to the proposal that the public authorities may properly refuse to consider it, and the question whether it is so defective that they may not legally award the contract to the bidder; in other words, the discretion of such authorities is a matter which may be important on these questions, and it would seem that a board having power to award contracts for public improvements may have power to make an award to one whose bid is informal or fails in some particular to comply with the proposal, while, if it refuses to consider the bid, it may not owe any duty to accept the same which the bidder can enforce."

Under the particular facts which are set forth in this case, we believe that the irregularities contained in the bid

Mr. Ralph McSweeney

of the Swan Construction Company may be regarded as informalities and may be waived since such waiver is in the interest of the State of Missouri.

CONCLUSION

Therefore, it is the opinion of this department that mere informalities contained in a bid for public improvement may be waived when the specifications contain such a waiver provision and when it is clearly to the best interest of the owner and is not detrimental to the spirit of the law providing for competitive bidding.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

A O'K

J. E. TAYLOR
Attorney General

JRB:VLB

COUNTY COURTS:
BOUNTIES:

A county court may inquire into the validity of a bounty claim made against the county before paying such claim and ~~that~~ if after such investigation, which may include evidence offered by any person or persons, the court is satisfied that the claim is fraudulent, it may refuse to pay.

April 9, 1952

FILED
62

4-10-52

Honorable John H. Mittendorf
Prosecuting Attorney
Johnson County
Warrensburg, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

> "Some question has arisen in this County as to the duty of the County Court with regard to payment of bounty for wolves killed within the County.
>
> "Recently a man filed claim with the County Clerk for the bounty and filed the necessary affidavit as provided by statute. An interested group appeared before the County Court and offered evidence to the effect that the claimant had not killed the wolf. Under the circumstances, is the County Court justified in hearing evidence as to the claim and does the County Court have any discretion in allowing the claim when the affidavit is filed?"

We direct your attention to Section 279.010, RSMo 1949, which states:

> "The county court of any county in this state may pay a bounty of twenty dollars each for any grown coyote or wolf and five dollars each for any coyote or wolf pup which may be killed in such county, also a bounty of five dollars for each grown wildcat, and three dollars for each wildcat kitten which may be killed in such county; provided, that each such bounty shall not be paid for any coyote, wolf, wildcat, the pups of coyotes or wolves

> or kittens of wildcats which may have been raised in captivity either within or without this state; provided further, that a coyote or wolf pup and a wildcat kitten shall be deemed such when under ten weeks old; provided, also, that it shall be unlawful to import into this state any such animals except for exhibition purposes and then only under permit as otherwise provided for by the statutes of this state."

However, the above section was amended by House Bill No. 344, passed by the 66th General Assembly, signed by the Governor on December 13, 1951, to become effective March 18, 1952. Section 279.010, supra, as amended, reads as follows:

> "The county court of any county in this state shall pay a bounty of thirty dollars each for any grown coyote or wolf and five dollars each for any coyote or wolf pup which may be killed in such county, also a bounty of five dollars for each grown wildcat, and three dollars for each wildcat kitten which may be killed in such county; provided, that each such bounty shall not be paid for any coyote, wolf, wildcat, the pups of coyotes or wolves or kittens of wildcats which may have been raised in captivity either within or without this state; provided further, that a coyote or wolf pup and a wildcat kitten shall be deemed such when under ten weeks old; provided, also, that it shall be unlawful to import into this state any such animals except for exhibition purposes and then only under permit as otherwise provided for by the statutes of this state."

In an opinion rendered by this department on March 24, 1952, to Honorable Gene Frost, Prosecuting Attorney of Jasper County, this department held:

> "It is therefore the opinion of this department that the county on and after March 18, 1952, shall pay the sum of $30.00 for any grown coyote or wolf and

the sum of $5.00 for each coyote or wolf pup which may be killed in the county and that the state treasurer shall reimburse the county treasurer two-thirds of all bounties paid by such county."

Section 279.020, RSMo 1949, states:

"1. Any person claiming the bounty under this chapter shall produce the whole pelt of the coyote, wolf or wildcat, wolf or coyote pup, or wildcat's kitten and exhibit the same for inspection by the clerk of the county court within ten days after the killing of such wild animal or animals, and shall take and subscribe an oath or affirmation that the pelt or pelts produced and exhibited by him had been killed by himself within the ten days last past and within such county, and that such pelt or pelts were not taken from any wolf or wolves, wildcat or wildcats, coyote or coyotes, or from wolf or coyote pup or pups or wildcat kitten or kittens raised by him or any other person or persons of whom he had knowledge that such animals were raised in capitivity.

"2. Following such oath or affirmation the said clerk of the county court shall then and there cause the ears of each wild animal pelt or pelts to be perforated by use of an ordinary gun wad cutter or similar device capable of removing a portion of the ears of such animal or animals, which said portion of said ears so removed shall not be smaller than the size of the bore of a twelve-bore shotgun, but not enough larger to spoil the value of such pelt or pelts to be used for commercial purposes. The said pieces so removed shall be known as 'scalps' of said animals in describing said pieces for any and all purposes connected with the payment of the bounty paid for the destruction of wildcats, wolves, coyotes, or their young. No bounty shall be paid for the scalps obtained from pelts of such animals unless

> the same are in a green or uncured condition. The pelts of such animals shall be returned to the owners of them after the scalps have been removed by the county clerk.
>
> "3. Any person or persons who shall violate or attempt to violate any of the requirements of this section shall be guilty of a misdemeanor."

Section 279.030, as amended by House Bill No. 344, supra, reads:

> "The clerk shall preserve all such scalps until the next regular term of the county court, when he shall produce such scalps to the county court and the court shall cause warrants to be made for the amount of bounty due to such claimant and shall forthwith order all such scalps to be destroyed by burning in the presence of the county court. The clerk shall thereupon certify to the state comptroller the name and address of the claimant for such bounty and the amount of bounty paid by the county, which shall be audited by the state comptroller, and upon approval by the state comptroller and the state auditor, the state treasurer shall refund to the treasurer of such county two-thirds of all bounties so paid by such county."

From the above it would seem to be clear that it is mandatory upon a county court to pay the bounty that is provided for in Section 279.010, as amended, if the provisions of Section 279.020, supra, are followed by the claimant. The question which you raise is whether it is mandatory upon a county court to pay the bounty or bounties provided for in Section 279.010, supra, as amended, if the claimant follows the provisions of Section 279.020, supra, by stating under oath that the animals upon which the bounty or bounties claimed were killed by him within ten days of the time of their presentation to the clerk of the county court, within the county in which the bounty claim is made, and that such animal or animals were not raised by him or by any other person, or do Sections 279.010, as amended, 279.020, and 279.030, as amended, permit the county court to inquire into and hear

evidence upon the statement by the claimant required by Section 279.020, supra, as to whether such statement is true or false, before the county court allows the claim?

It would seem to us that the county court not only may, but that it is duty-bound to satisfy itself that the bounty claim is valid, and is not based upon fraud, before it pays out county and state money to a claimant under Section 279.010, supra, as amended, and that if, after such inquiry, the county court is convinced that the claim is fraudulent, it may and should refuse to pay the bounty.

At the outset it must be admitted that the right of the county court of inquiry into bounty claims, and the refusal of the court to pay such claims if they find them to be fraudulent, is not apparent upon the face of Sections 279.010, 279.020, and 279.030, supra. These sections simply hold that if a claimant makes a certain statement under oath the county court should pay the bounty. We must therefore look elsewhere for authority to support the position which we have assumed above.

In this connection we would direct your attention to Section 50.160, RSMo 1949, which section states:

> "The county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts; to enforce the collection of money due the county; to order suit to be brought on bond of any delinquent, and require the prosecuting attorney for the county to commence and prosecute the same; to issue all necessary process to secure the attendance of any person, whether party or witness, whom they deem it necessary to examine in the investigation of any accounts; and in order to procure the exhibition or delivery to them of any accounts, books, documents or other papers, the said court may issue process directed to the person in whose custody or care the said accounts, books, documents or other papers may be, commanding him to deliver or transmit the same to said court, which process shall be served by the sheriff; and the said court may examine all parties and witnesses on

> oath, touching the investigation of any accounts, and if any person, being served with such process shall not appear according to the command thereof, without reasonable cause, or if any person in attendance at any hearing or proceeding shall, without reasonable cause, refuse to be sworn or to be examined, or to answer a question or to produce a book or paper, or to subscribe or swear to his deposition, he shall be deemed guilty of a misdemeanor; provided, that if the county court finds it necessary to do so, it may employ an accountant to audit and check up the accounts of the various county officers."

We would also direct your attention to Section 50.170, RSMo 1949, which states:

> "When a demand against a county is presented to the county court, the usual form of entry may be exemplified thus:
>
> "A B v. ..... county. The account of A B for the sum of ..... dollars being presented and inquired into, it is found by the court that the sum of ..... dollars is due him from the county, payable out of (express the particular fund, as the case may require), and for which the clerk is ordered to issue a warrant."

In the case of State ex rel. Becker v. Wehmeyer, 113 S.W. (2d) 1031, the Court was construing the power of a county court to audit and settle demands against the county. At l.c. 1033, the Court stated:

> "This follows from the fact that as a part of the jurisdiction with which county courts have been invested they have been given the power and duty of auditing and settling all demands against the county. Sections 2078, 12162, R.S.Mo. 1929, Mo. St. Ann. Sections 2078, 12162, pp. 2658, 6446. While it is true that in the performance of this duty a county court does not act judicially but only in an administrative capacity as the

> fiscal agent of the county, yet it does not act without regard to its own judgment or opinion in the matter, but instead is called upon to exercise a discretion which is vested in it for the purpose of enabling it to protect the county from unjust or incorrect claims. Perkins v. Burks, supra."

In the case of State ex rel. Mitchell v. Rose, 281 S.W. 396, the Court stated, l.c. 397:

> "The exact amount to which the local registrar may become entitled is not fixed by the foregoing statute, except as it depends upon the number of births and deaths occuring in his district, as ascertained by the state registrar from reports made by relator, thus establishing a debt against the county without affording the court an opportunity to examine and audit the account, and compelling the county court to disburse county funds on account of a report of births and deaths of which it may have evidence at hand did not occur. Although the Legislature has the power to provide for the payment of the fees to which the relator might be entitled out of the county treasury, it cannot take away from the county court the right to call in question both the facts and the law on which the payment of such fees is demanded. If the county court has no right to raise the question as to whether or not the number of births and deaths as certified to it by the state registrar in fact occurred, then the county court must go on paying the fees demanded by the relator as certified to the county court, regardless of the fact whether or not such reports are correct.
>
> "The various provisions of the Constitution and statutes (articles 6, sec. 36, Const. of Mo., and sections 2574 and 9560, R.S. Mo. 1919) demonstrate that it is not only within the power, but is the duty,of the county court to look after public funds, examine, audit, adjust, and settle all accounts to which the county shall be a party, and to

> pay out of the county treasury any sum of money found to be due by the county on such accounts; in short, responsibility for the safety of public funds, the accuracy and honesty of accounts, and statements of officials, is imposed on the county courts. It is for the county court to audit the claim of the relator to determine the correctness of same and to say whether it will demand that the correctness of the reports made to it by the state registrar shall be decided by the judicial department of the government before payment is made. State ex rel. Forgrave v. Hill et al., 198 S.W. 844, 272 Mo. 206, loc. cit. 213."

From the above it would, as we said, seem to be clear that it is the duty of the county court to inquire into all claims which are made against it, before paying such claims, and to refuse to pay such claims as it deems to be unjust or fraudulent.

Finally, we direct attention to Section 558.250, RSMo 1949, which states:

> "Any member of the county court, common council or board of trustees, or officer or agent of any county, city, town, village, school township, school district, or other municipal corporation, who shall, in his official capacity, willfully or corruptly vote for, assent to or report in favor of, or allow or certify for allowance, any claim or demand, or any part thereof, against the county, city, town, village, school township, school district, or other municipal corporation, of which he is such officer or agent, or against the county court, common council or board of trustees of which he is a member -- such claim or demand, or part thereof, being for or on account of any contract or demand or service not authorized or made as provided or required by law -- every such person so offending shall, on conviction, be punished by imprisonment in the penitentiary not more than five years, or by a fine of not less

than one hundred nor more than five thousand dollars, or by imprisonment in the county jail not less than two nor more than twelve months, or by both such fine and imprisonment."

In the light of the above section, would any one say that if a county court or any member or members thereof had personal knowledge, or proof, that an animal upon which a bounty was claimed was killed outside the county or that claim was not made within ten days after the animal was killed, or that the animal had been raised by claimant or by some other person and that claimant's statement, under oath, in regard to these matters was false, that the court should go ahead and pay the claim? We think not.

CONCLUSION

It is the opinion of this department that a county court may inquire into the validity of a bounty claim made against the county before paying such claim and that if after such investigation, which may include evidence offered by any person or persons, the court is satisfied that the claim is fraudulent, it may refuse to pay.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HPWab

TAXATION: THIRD CLASS COUNTIES: TOWNSHIP ORGANIZATION: TOWNSHIP COLLECTOR'S FEES:

Township collector of 3rd class township organization county to receive fees provided by Sec. 139.430(4), RSMo 1949, for collection of all general taxes in township. Not entitled to receive fee in addition to that prescribed by Sec. 139.430(4), for collection of personal taxes by distraint and sale under Sec. 139.360, RSMo 1949, since additional fee is not provided for by any Missouri statutes.

FILED
63

February 19, 1952

2-20-52

Honorable Weldon W. Moore
Prosecuting Attorney of
Texas County
Houston, Missouri

Dear Sir:

Your recent request for a legal opinion of this department has been received and reads as follows:

> "I have been requested by Township Collectors of Texas County, Missouri, to ask your opinion as to whether or not a Township Collector in a 3rd class county is entitled to additional fees for collection of personal property taxes under Section 139.360, Missouri Revised Statutes 1949."

No attempt is made in the opinion request to explain what is meant by the term "additional fees," but we assume that it refers to fees for collecting personal taxes in addition to those allowed by law to a township collector for the collection of taxes generally, in his township.

While the inquiry relates to the additional fees of a township collector in a third class township organization county, Sections 139.320 to 139460, inclusive, of Chapter 139, RSMo 1949, provide for the payment and collection of current taxes in township organization counties generally. No statutory provisions limit the application of said sections to any particular class of counties, therefore they are as fully applicable to third class, as to any other class of township organization counties.

Section 139.360, prescribes the procedure to be followed by the collector when the personal property owner fails to pay taxes levied against his property, and reads as follows:

> "In case any person shall refuse or neglect to pay the tax imposed, the collector shall levy the same by distraint and sale of the goods and chattels of the person who ought to pay the same."

Section 139.430(4) provides the commission a township collector shall receive for the collection of taxes and reads as follows:

> "(4) The township collector shall receive a commission of two and one-half per cent on the first forty thousand dollars collected; one per cent on the next forty thousand dollars collected; and three-fourths of one per cent on the remainder of all moneys collected by him."

It is noted that Section 139.360, RSMq 1949, does not provide a fee for the performance of the duties mentioned in that section, and it is also noted that no other section of the statutes provide any fee for the performance of such duties, or that the collector shall receive any other fees for collecting general taxes than those provided by Section 139.430(4), supra.

The general rule as to the right of an officer to receive compensation in the absence of specific statutory authority, has been given in the well known case of Nodaway County v. Kidder, 344 Mo. 795, in which the Supreme Court denied the appellant county judge the right to recover additional fees and mileage from his county, than those provided by law. At l. c. 801, the court said:

> "The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to

> any different mode of securing same. Such statutes, too must be strictly construed as against the officer. (State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S.W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 492, 279 S.W. 195, 196 ; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.)
>
> "It is well establsihed that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. (State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S.W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S.W. 655; Williams v. Chariton County, 85 Mo. 645.)
>
> "The duties performed by appellant, and for which the additional fee or salary and mileage, was paid, were with reference to matters pertaining to and relating to his official duties as presiding judge of the county court and said services were within the scope of said official duties. The work in which appellant was engaged was directly under the supervision of the county court. Public policy requires that a public officer be denied additional compensation for performing official duties."

Therefore in the absence of any statute authorizing such additional fee, the township collector is not entitled to receive any other compensation for his services in the collection of all general taxes than that provided by Section 139.430(4), supra, and is not entitled to a fee for the performance of his duties under the provisions of Section 139.360, supra.

CONCLUSION

It is therefore the opinion of this department that a township collector of a third class county operating under township organization, is entitled to receive a commission for the collection of all general taxes in his township at the rates specified by Section 139.430(4), RSMo 1949, and that for the collection of taxes by means of distraint and sale of personal property when the owner has failed to pay the taxes levied against such property, said

Honorable Weldon W. Moore

collector is not entitled to receive any fee for his services in addition to that provided by Section 139.430(4), supra, since no Missouri statutes provide that the township collector shall be entitled to receive the additional fee for his services under such circumstances.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PNC:hr

SCHOOLS:
ROADS AND BRIDGES:
SPECIAL ROAD DISTRICTS:
COUNTY SUPERINTENDENT
OF SCHOOLS:

Secretary of county superintendent of schools may do work for other county officers and receive compensation therefor. Special road district may cease to maintain roads in territory which may or may not be in district.

March 28, 1952

FILED
63

3-31-52

Honorable J. Hal Moore
Prosecuting Attorney
Lawrence County
Mt. Vernon, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

> "I would like to submit the following propositions to you in order to receive your opinion on them. Where by law, a clerk, secretary or stenographer of schools is allowed only $1500.00, can she do additional work for other agencies of the County, particularly the County Court and receive additional compensation for these duties.
>
> "Second proposition. Under your opinion number 65.51, dated December 5th, 1951 you have stated that the County Court is authorized to pay $600.00 during the calendar year of 1951, for clerical help. Does that mean that the County Court has discretion in this matter, or are they under an absolute duty to pay such sum.
>
> "We have a situation here in Lawrence County which is this. We have a special road district which has been collecting taxes and maintaining the road for a period of eight years off of a small area which they have always considered in their district. On checking the County Court records, we have been unable to ascertain where this small section was noted into their road district. Under this statement of facts, can a special road district now at this time, drop that small area and refuse to maintain their roads.

> If they cannot, what procedure must they take in order to put this small area in a common road district. Am I right in interpreting the law to mean that the special road district would have to disband and reorganize without this small area."

Your first question is whether a "clerk, secretary, or stenographer of schools," who, by law, is allowed only $1500 for her services as such, can do work for other county agencies and receive compensation therefor in addition to the aforesaid $1500. We assume that when you say "clerk, secretary, or stenographer of schools," you mean the secretary of the county school superintendent, who is, by law, limited to a salary of $1500 per year.

In answer to this question we enclose a copy of an opinion rendered by this department on March 23, 1949, to Honorable Bert Cooper, Director, Department of Business and Administration of the State of Missouri. We believe that the fact situation in the enclosed opinion is sufficiently analagous to that stated by you to apply, and that, on the authority of the enclosed opinion the answer to your first question is that the secretary of the county superintendent of schools may be employed by other county agencies and may receive from them compensation in addition to that she receives as secretary for the county school superintendent.

Your second question refers to the meaning of an opinion rendered by this department on November 27, 1951, to Honorable Robert B. Osborn, Prosecuting Attorney of Reynolds County. A copy of this opinion is enclosed. There is also enclosed a copy of our opinion rendered by this department December 31, 1951, to Honorable Joe Collins, Prosecuting Attorney of Cedar County, Missouri, which we believe answers your second question.

Your third question relates to the matter of excluding from a special road district an area which has heretofore been treated as being part of such district. From your statement of the fact situation it appears that for the past eight years the officers of the special road district have been collecting taxes on the area in question and have been maintaining the roads in that area; in other words, proceeding on the assumption that this area was a part of the special road district. It now seems that the officers of the special road district are of the opinion that this particular area never was a part of the special road district. Whether this area was or was not is of course a matter

of fact, and the fact that for eight years it was assumed to be, is no proof that it is part of the special road district.

Of course the officers of the special road district can cease to receive the percentage of taxes a special road district is entitled to receive from the people who live in the area which you mention, and cease to maintain the roads in that area. If, thereafter, the residents of this area bring suit against the officers of the special road district for their failure to maintain the roads in that area, the court would have to decide whether this area was or was not in the special road district, and that decision would be determinative of the whole matter whichever way the court decided.

CONCLUSION

It is the opinion of this department:

1. That the secretary of the county superintendent of schools may do work for other county officers and receive compensation therefor, in addition to the compensation which is received as secretary for the county superintendent of schools, provided such additional work does not interfere with or conflict with the duties of the secretary of the county superintendent of schools.

2. Special road district may cease to receive the percentage of taxes a special road district is entitled to receive from the persons who live in territory about which there is a dispute as to whether or not such territory is part of such road district and may refuse to maintain the roads in such territory.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

Enclosures.

HPW:ab

PROSECUTING ATTORNEY : Duty of Prosecuting Attorney to sue defaulting township collector.

TOWNSHIPS:

COLLECTOR:

TAXES:

FILED
63

April 17, 1952 O-8-52

Honorable Elvis A. Mooney
Prosecuting Attorney
Bloomfield, Missouri

Dear Sir:

This is in reply to your request for an opinion which is as follows:

> "Stoddard County is operating under the township form of county government; township organization has been in effect in Stoddard County for approximately 40 years. Also Stoddard County is a third class county.
>
> "On the third day of March, 1952, a representative of the State Auditor's Office filed the audit of the county with the Clerk of the County Court and on the same day reviewed the findings of the auditors as shown therein.
>
> "The findings of the auditors revealed that William Young, the ex-collector of Liberty Township, had failed to turn over funds collected for the State, the County, Road and Bridge, Special Road District, and various school districts (rural and consolidated) in Liberty Township. Apparently it will be necessary to bring actions for the recovery of these funds.
>
> "The office of the State Auditor called my attention to the copy of a letter by

> the Hon. Tyre W. Burton, Assistant Attorney General, on January 24, 1939, addressed to Mr. Frank Huffhines, Prosecuting Attorney, Stone County, Galena, Missouri, wherein an opinion rendered by Mr. Burton on December 21, 1938, is referred to. This letter indicates that it is not my duty, as prosecuting attorney of Stoddard County, to bring an action for the recovery of money due and unpaid, by Mr. Young, to the various school districts; but that it is my duty to bring an action for the recovery of money due and unpaid to the State and the County.
>
> "Will you please furnish me an opinion as to my duties relative to bringing suits for the collection of funds due and unpaid those political sub divisions other than the state and county, particularly funds due the various school districts, the township and the special road district."

At the outset, we desire to call attention to the opinion (Huffhines - 1939) mentioned in your letter, with regard to the question as to whether or not the prosecuting attorney is authorized to represent a school district in an action to recover moneys from a county treasurer. The conclusion in this opinion, that it was not the official duty of the prosecuting attorney to render services to school districts and represent them in litigation, was based primarily upon the fact that there was no statute providing for such representation. In the particular instance before us, and for the reasons set out hereafter, we believe that it is the duty of the prosecuting attorney to bring suit against a township collector who is in default. We believe the following statutes are applicable to the present situation and, therefore, set them out as follow:

> "139.420. Township collector --final settlement of accounts.--1. The township collector of each township, at the term of the county court to be held on the first Monday in March

of each year, shall make a final settlement of his accounts with the county court for state, county, school and township taxes; produce receipts from the proper officers for all school and township taxes collected by him, less his commission; pay over to the county treasurer and ex officio collector all moneys remaining in his hands, collected by him on state and county taxes; make his return of all delinquent or unpaid taxes, as required by law, and make oath before the court that he has exhausted all the remedies required by law for the collection of such taxes.

"2. On or before the twentieth day of March in each year, he shall make a final settlement with the township board.

"3. If any township collector shall fail or refuse to make the settlement required by this section, or shall fail or refuse to pay over the state and county taxes, as provided in this section, the county court shall attach him until he shall make such settlement of his accounts or pay over the money found due from him; and the court shall cause the clerk thereof to notify the director of revenue and the prosecuting attorney of the county at once of the failure of such township collector to settle his accounts, or pay over the money found due from him, and the director of revenue and the prosecuting attorney shall proceed against such collector in the manner provided in section 139.440, and such collector shall be liable to the penalties provided in section 139.440."

"139.430. Township collector--monthly statements -- disposition of collected moneys--commission.-- 1. The township collector, on or before the fifth day of each month, shall make and file in the office of the county clerk a statement showing the amount of taxes collected by him for all purposes during the preceding month, which statement shall be sworn to by such township collector before the county clerk, or some other officer authorized to administer oaths.

"2. On or before the tenth day in each month, the township collector, after deducting his commissions, shall pay over to the county treasurer and ex officio collector all state and county taxes collected by him during the preceding month, as shown by the statement required by this section, and take duplicate receipts therefor, one of which he shall retain and the other he shall file with the county clerk; and the county clerk shall charge the treasurer with the amounts so receipted for, to be accounted for at the annual settlement.

"3. The township collector, in like manner, on or before the twentieth day of each month, shall pay over to the township trustee and ex officio treasurer after deducting his commission all township taxes and funds of every kind belonging to the township, collected by him during the preceding month, and take duplicate receipts therefor, one of which he shall retain and the other he shall deposit with the township clerk, who shall charge the township trustee and ex officio treasurer with the amount so receipted.

"4. The township collector shall receive a commission of two and one-half per cent on the first forty thousand dollars collected; one per cent on the next forty thousand dollars collected; and three-fourths of one per cent on the remainder of all moneys collected by him."

"139.440. Township collector--default, penalties; certified copy of statement.--1. If any township collector shall fail or refuse to file the statement required by section 139.430, or, having filed such statement, shall neglect or refuse to pay over to the county treasurer and ex officio collector the state and county taxes collected by him during the preceding month, as shown by such statement, the county clerk, immediately after such default, and not later than the fifteenth day of the month in which such statement was or should have been made, shall

certify such fact to the director of revenue and the prosecuting attorney of the county; and the director of revenue and the prosecuting attorney shall proceed against such defaulting township collector in the same manner as is provided by section 139.270 for proceeding against defaulting county collectors and ex officio county collectors, and the township collector shall forfeit his commission on all moneys collected and wrongfully withheld, and otherwise be liable to all the penalties imposed by section 139.270.

"2. The county clerk shall certify a copy of such monthly statement to the director of revenue within the time prescribed for certifying the statements of the county collectors and ex officio collectors."

"139.270. Refusal to pay--forfeiture--distress warrant.--1. If any county collector, or ex officio county collector, fails or refuses to pay the taxes and license fees into the county treasuries and to the director of revenue as provided in section 139.210, he shall forfeit his commissions on the amount wrongfully withheld and in addition shall pay a penalty of ten per cent of the amount wrongfully withheld.

"2. The director of revenue within thirty days shall issue a distress warrant for such state taxes and penalties, and the prosecuting attorney within thirty days shall proceed to collect the county, school, road and municipal taxes by suit on the official bond of the defaulting collector."

(RSMo 1949)

Under the above statutes we see that it is the duty of the township collector to make a final settlement of his accounts with the county court for state, county, school and township taxes; producing receipts from the proper officers for school and township taxes collected by him, and pay to the county treasurer all moneys collected on state and county taxes. We note that upon a failure to make such a settlement or to pay over money found due from him, it becomes the duty of the county clerk to notify the Director of Revenue and the prosecuting attorney of the failure to collect the accounts and to make the payments. The method for proceeding against a township collector in default is the same as provided for a defaulting county collector, and we note that that section provides that a prosecuting attorney shall proceed to collect the county, school, road and municipal taxes by suit on the official bond of the defaulting collector.

Reading the above statutory provisions together we believe it was the intent of the Legislature that the prosecuting attorney should proceed against the township collector for all the taxes for which the township collector is in default.

Under the provisions of Section 139.270, RSMo 1949, this is accomplished by a suit on the official bond of the defaulting collector. Provision for a bond for a township collector is found in Section 65.460, RSMo 1949: "* * * The conditions of such bond shall be that he, the said collector, will faithfully and punctually collect and pay over all state, county, township and other revenue, including school taxes, that may become due and collectable during the period for which such collector shall be elected or appointed; * * * ."

CONCLUSION.

Therefore, it is the opinion of this department that it is the duty of the prosecuting attorney to bring suit against a defaulting township collector for not only the state and county taxes but also the road and school taxes which have become due and collectable.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JRB:ir

COUNTY ORGANIZATION:
COUNTY COLLECTOR:
COUNTY ASSESSOR:

Until election and canvass of vote under Sec. 65.610, RSMo, 1949, abolishing township organization is had, no vacancy exists in office of county collector and county assessor and filings for such offices prior thereto are not authorized by law.

FILED
63

June 24, 1952

6-25-52

Honorable Garner L. Moody
Prosecuting Attorney
Wright County
Hartville, Missouri

Dear Mr. Moody:

The following opinion is rendered in answer to your recent request reading as follows:

> "Wright County is a county with township organization. A petition has been filed to vote out township organization at the next general election.
>
> A man has filed for County Assessor and another filed for County Collector, both filings being proper except for the fact that those offices do not exist under our township organization, and will not exist in this county until after township organization has been voted out.
>
> I would like to know how such filings shall be treated, and of what effect they might be in the event township organization is voted out of this county in the next general election. Or, can a man be elected to a county office at the same election that brings such office into existence?"

Under the facts outlined in your letter, quoted above, it is not possible to assume that township organization will be voted out in Wright County in the general election to be held in November of 1952. Section 65.610, RSMo, 1949, provides as follows:

> "At any general election holden in this state, in any county having adopted township organization under this chapter, upon the petition of one hundred voters of the county, praying the county court to resubmit the question of township organization to the voters of said election, it shall be the duty of the county court to submit the question again at such election, in like manner as provided in sections 65.010 to 65.050; and if it shall appear, after the canvass of the votes as provided in said sections of this chapter, that a majority of all the votes cast upon that question shall be against township organization, then township organization shall cease in said county; and all laws in force in relation to counties not having township organization shall immediately take effect and be in force in such county."

A reading of Section 65.610, RSMo, 1949, quoted above, clearly discloses that township organization in Wright County will continue until any vote abolishing such organization is fully canvassed. In the case of State ex inf., v. Duncan, 265 Mo. 26, the Supreme Court was passing on questions arising out of an election to abolish township organization. One important question in such case was whether a vacancy occurred in the county office of collector upon abolishment of township organization. In treating of this question the Court spoke as follows at 265 Mo. l.c. 49:

> "This brings us to a consideration of the other question in this case; <u>since it follows that township organization having been lawfully voted out, a vacancy thereby ensued in the office of collector of the revenue of Butler county</u>." (Underscoring ours.)

Based on the quoted language from State ex inf. v. Duncan, supra, it must be concluded that until such time as Wright County abolishes township organization, no vacancy in a county office of collector and assessor exists to be voted on at any primary or general election. Consequently, the filings referred to in paragraph two of your request should be held for naught and no authority exists for accepting the same.

Honorable Garner L. Moody

CONCLUSION

It is the opinion of this department that until a canvass of the vote abolishing township organization, taken under authority contained in Section 65.610, RSMo, 1949, is finally made, no vacancy is created in the office of county collector and county assessor, and any filings for such office at a primary or general election prior thereto are not authorized by law.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:lw

OPERATORS: Persons having operator's license must take examination as required by statutes in order to obtain chauffeur's license.

FILED
63

September 30, 1952 10-17-52

Honorable J. Hal Moore
Prosecuting Attorney
Lawrence County
Mt. Vernon, Missouri

Dear Sir:

This is in reply to your letter of August 30, 1952, in which you request an official opinion of this office.

Your request is as follows:

> "I would appreciate your department's opinion of the following circumstances. Does an applicant that has drivers licenses in full force have to take an examination in order to acquire chauffeur's licenses under the laws of Missouri."

In answer to your request, we must refer first to the statutes. Section 302.173, RSMo, Cumulative Supplement 1951, is quoted in part, as follows:

> "Driver's examination required, when--procedure.-- 1. Any applicant for an operator's license, or chauffeur's license issued pursuant to the laws of this state shall be examined as herein provided. * * * No applicant for a renewal license shall be required to submit to any examination of his ability to safely operate a motor vehicle over the highways of this state unless the facts set out in such renewal application or record of convictions on the expiring license, or the records of the director show that there is good cause to authorize the director to require the applicant to submit to such examination. * * *"

It will be noted that this section treats operators and chauffeurs as being subject to the same requirements of the law. However, in accordance with the text where it reads "operator's or chauffeur's license," the word "or" may be said to be used in the disjunctive sense.

The definition of chauffeur is contained in Section 302.010, subsection (1), RSMo, Cumulative Supplement, 1951, and reads as follows:

> "(1) 'Chauffeur', an operator who operates a motor vehicle in the transportation of persons or property, and who receives compensation for such service in wages, salary, commission or fare; or who as owner or employee operates a motor vehicle carrying passengers or property for hire; or who regularly operates a commercial motor vehicle of another person in the course of, or as an incident to his employment, but whose principal occupation is not the operating of such motor vehicle."

It will be noted also that there is nothing contained in the statutes that requires a chauffeur to obtain an operator's license before he drives an automobile as an "operator." His qualifications as a chauffeur are sufficient to enable him to operate his own automobile for other purposes than as a chauffeur. With an operator this is not so. He is not licensed nor does he have a certificate of his qualifications to receive compensation in wages, salary, commission or fare in the transportation of persons or property. A chauffeur is required to be licensed as a licensed occupation for the protection of the public and although provisions for his licensing are contained in the same chapter of the law as that of an operator, it is our belief that the same qualifications as an operator will not qualify one as a chauffeur.

CONCLUSION

It is therefore the opinion of this office that an applicant who has an operator's license is required to be

Honorable J. Hal Moore

examined as provided in Chapter 302, RSMo 1949, and Laws 1951, H.B. 22, 49, 56, and 114, in order to obtain a chauffeur's license.

Respectfully submitted,

JAMES W. FARIS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JWFab

GIFTS TO STATE: DISPOSITION; WHEN PURPOSE OR FUND NOT DESIGNATED:

Check payable to Treasurer of Missouri in sum of $2,000 in payment of group life policy in which State of Missouri is beneficiary; the proceeds of check to be deposited in treasury to credit of ordinary revenue fund of state.

FILED
64

September 15, 1952

9-17-52

Honorable M. E. Morris
State Treasurer
State Capitol Building
Jefferson City, Missouri

Dear Sir:

Your request for a legal opinion of this office has been received and reads in part as follows:

> "It is requested that you please furnish this department with a written opinion stating where Check No. D 451570, dated January 21, 1952, made payable to M. E. Morris, Treasurer of the State of Missouri, in the amount of $2,000.00 should be deposited.
>
> "This check is in payment of a group insurance policy on J. Sigado who was insured in the group of Kellogg Switchboard & Supply Company employees."

Your letter requests an opinion as to where the proceeds of above described check should be deposited. However, you have informed us since the date of your letter that the request was meant to inquire into what fund such proceeds should be deposited, rather than the place of deposit; consequently, our opinion will be given on the facts disclosed by the later information, instead of that stated in the opinion request.

Section 33.550, RSMo 1949, authorizes gifts to be made to the state, and the duties of the director of revenue in accepting those gifts. Said section reads as follows:

> "Whenever any device, bequest, donation, gift or assignment of money, bonds, or choses in action, or any property, real, personal or mixed, shall be made or offered

> to be made to this state, the director of revenue shall be and is hereby authorized to receive and accept the same on such terms, conditions and limitations as may be agreed upon between the grantor, donor or assignor of said property and said official, so that the right and title to such property shall pass to and vest in this state, and all such property so vested in this state, and the proceeds thereof when collected may be appropriated for educational purposes, or for such other purposes as the legislature may direct."

For purposes of our discussion herein, it is assumed that the gift was legally made and accepted; that the provisions of above section have been complied with, and the title to the gift is now vested in the State of Missouri.

In making the gift to the state, it is noted that the donor failed to provide any terms or conditions upon which it must be accepted, and without any indication as to the fund or purpose for which it must be used if accepted.

If such was the intention of the donor, this was legally proper, and is strictly in accord with the provisions of Section 33.550, supra. In effect said section provides that the proceeds of gifts to the state (not designated for a particular fund or use by the donor) may be appropriated for educational or such other uses as the legislature may direct. What the treasurer is to do with the gift until such time as the legislature may appropriate it for some special use is the matter for our immediate attention and discussion.

Article III, Section 36, Constitution, provides where all state revenue and money collected shall go, and reads as follows:

> "All revenue collected and money received by the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury, except in pursuance of appropriations made by law. * * *"

Article IV, Section 15, Constitution of 1945, makes the state treasurer the custodian of all state funds, and his duties regarding such custody. Said section reads as follows:

> "The state treasurer shall be custodian of all state funds. All revenue collected and moneys received by the state from any source

> whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law. Such institutions shall give security satisfactory to the governor, state auditor and state treasurer for the safekeeping and payment of the deposits on demand of the state treasurer authorized by warrants of the state auditor. No duty shall be imposed on the state treasurer by law which is not related to the receipt, custody, and disbursement of state funds."

Section 30.240, RSMo 1949, provides how the treasurer shall keep the moneys of the state, and his duties relating thereto, and reads in part as follows:

> "All moneys now belonging to or that may at any time hereafter belong to the state, that is now in the state treasury or that hereafter may be required by law to be paid into the treasury for any purpose whatever, shall immediately on receipt thereof be deposited by the treasurer to the credit of the state, for the benefit of the fund to which such moneys respectively belong, in such banks, bank or banking institutions in this state as he may from time to time, with the approval of the governor and state auditor, select. * * *"

None of the above constitutional or statutory provisions provide, and we are unable to find any other consitutional, statutory provisions, or court decisions which do provide into what fund financial gifts shall go, when the donor has failed to designate the fund or purpose for which such gifts must be used. It appears that this particular situation has never been presented, or passed upon by the appellate courts of the state.

While Section 33.080, RSMo 1949, does not provide that such gifts shall be deposited in the treasury to the credit of a particular fund, or that gifts of this nature can only be used for certain purposes, yet it does appear that the situations to which the provisions of this section are applicable are similar in some respect to the present situation, and are useful in reaching a decision as to what fund the gift shall be credited. Said section reads as follows:

> "All fees, funds and moneys from whatever source received by any department, board,

bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the general assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the constitution of this state), shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer. Any official or other person who shall willfully fail to comply with any of the provisions of this section, and any person who shall willfully violate any provision hereof, shall be deemed guilty of a misdemeanor; provided, that in the case of state educational institutions there is excepted herefrom gifts or trust funds from whatever source: Appropriations, gifts, or grants from the federal government, private organizations and individuals; funds for or from student activities, farm or housing activities, and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same, and hospital fees; all of which excepted funds shall be reported in detail quarterly to the governor and biennially to the general assembly."

In the enactment of this section it appears to have been the intention of the legislature that no unexpended balances should remain in the various state funds at the end of the biennium, after all obligations on said funds were discharged and the appropriations therefor had lapsed, and that under such circumstances said balances should be transferred by the treasurer to the credit of the ordinary revenue fund of the state. From this fund the legislature might make appropriations for the various purposes authorized by law when and where the need is greatest. It seems only logical that all state funds not previously obligated for any particular use or purpose should be credited to this fund and made available for future appropriations.

It seems that such was the intention of the legislature with reference to the unexpended balances referred to in this section, and

that the status of the proceeds of the gift is so similar to that of the unexpended balances that they should be disposed of in the same manner, that is, by depositing them in the state treasury to the credit of the ordinary revenue fund.

CONCLUSION

It is the opinion of this department that a check payable to M. E. Morris, Treasurer of Missouri, in the sum of $2,000.00, and given in payment of a group life policy in which the State of Missouri is named beneficiary; that the proceeds of said check should be deposited in the treasury to the credit of the ordinary revenue fund of the state by the treasurer.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PNC:hr

CRIMINAL LAW: FUNDS, FOURTH CLASS CITY: DISBURSEMENT: PROSECUTION FOR: WHEN:

Treasurer of 4th class city disbursing funds after failure of city to publish semi-annual financial statement required by Sec. 79.160, RSMo 1949; and before effective date of Sec. 79.165, Laws of 1951, making payment by treasurer under such circumstances a crime, could not be prosecuted, since the act was not a crime when committed. But after effective date, if treasurer disburses city funds and semi-annual statement has not been published prior to disbursement, he may be prosecuted for violation of Sec. 79.165.

FILED
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January 29, 1952

1-30-52

Mr. Charles E. Murrell, Jr.
Prosecuting Attorney
Edina, Missouri

Dear Sir:

This is to acknowledge receipt of your request for a legal opinion of this department which reads as follows:

> "I would like to have an opinion of your office, as soon as possible in connection with Section 79.160 and 79.165, RSMo 1949, the latter being the Laws of 1951, House Bill Number 192.
>
> "On what date does Section 79.165 become effective and does it apply to the failure of a city to publish a financial statement as required, in July of 1951."

We are also in receipt of your later letter in which the opinion request is explained in more detail. Said letter reads in part as follows:

> "I am again requesting your office to render the opinion asked for in my recent letter since I am sure that this office is going to receive several complaints of violation of

> 79.165 in connection with the failure of the city of Edina, Missouri to publish a financial statement last July."

Since receiving the letters quoted above you have further informed us that no semi-annual statements of the City of Edina, Missouri, have been published during the five years immediately preceding the date of the opinion request, and that the financial statement required to have been published in July, 1951, has not been published either before or after the effective date of Section 79.165, supra. It is in regard to this particular financial statement that your inquiry deals, and consequently our opinion herein will be limited to a discussion of the proposition as to whether or not if the treasurer of Edina, Missouri, pays out city funds, upon warrants or orders of the board of aldermen after the end of July, 1951, and no semi-annual financial statement of the city has been published prior to such payment, said treasurer may not be prosecuted for a violation of Section 79.165, supra, when the alleged payments were made before the effective date of said Section, but the treasurer may be prosecuted for a violation of said section after the effective date, when the semi-annual statement required to have been published in July, 1951, had not been published prior to such payment by him.

Sections 79.160, RSMo 1949, and 79.165, Laws of 1951, are referred to in your letter, and such reference calls for an interpretation and an application of them to facts given in the opinion request.

Section 79.160, RSMo 1949, provides that the board of aldermen of a fourth class city shall publish a statement of the financial affairs of the city semi-annually and reads as follows:

> "The board of aldermen shall semi-annually in January and July of each year make out and spread upon their records a full and detailed account and statement of the receipts and

> expenditures and indebtedness of the city for the half year ending December thirty-first and June thirtieth, preceding the date of such report, which account and statement shall be published in some newspaper in the city."

Section 79.165, Laws of 1951, prohibits the disbursing of funds from the treasury of a fourth class city until after the financial statement provided for by the preceding section has been made. A penalty is provided for a violation of this section by a treasurer of such a fourth class city. Said section reads as follows:

> "In the event the financial statement of any fourth class city is not published as required by Section 79.160, RSMo 1949, the treasurer of such city shall not pay out any money of the city on any warrant or order of the board of aldermen after the end of the month in which such financial statement is required to be published until such time as said financial statement is published. Any treasurer violating the provisions of this section shall be deemed guilty of a misdemeanor and punished according to law."

The inquiry is made as to when Section 79.165 became effective as a law. Upon investigation it appears that Section 79.165, Laws of 1951, became effective on October 9, 1951.

Under the provisions of Section 79.160, supra, a financial statement of the City of Edina, Missouri, for the period beginning January 1, 1951, and ending June 30, 1951, was required to be published in July, 1951, but it appears that such statement was not published during that month and that it has not been published at any time after July, 1951. Under such circumstances, if the treasurer pays out city funds after the end of July, 1951, and before

the effective date of Section 79.165, supra, on October 9, 1951, when the financial statement had not been published prior to the payment, can he be prosecuted for a violation of said section? In this connection the further question immediately arises as to whether or not the section is an ex post facto law and as to the enforceability of same. Both the state and federal constitutions prohibit the enactment of laws of this nature, and if the law is ex post facto, it is unenforceable.

In the case of Cummings v. Missouri, U. S. 4 Wal. 277, L. E. 356, an ex post facto law was defined as one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.

From a careful reading of Section 79.165, supra, it is noted that a new offense is defined and that this section does not make the offense criminal when committed, prior to its enactment, and it seems that it was not the intention of the legislature to create an ex post facto law. If the law is not ex post facto, to hold that it applies to offenses committed prior to its effective date, which were not criminal offenses when committed, and are now punishable as such after the effective date, would in effect be giving the law an ex post facto construction, and such a construction is as pernicious as creating an ex post facto law. This principle was held to be the law in the case of St. Louis Bridge Terminal Ry. Co. v. United States, 188 Fed. 191, in which the court said at l. c. 193:

> "A penal statute which creates and denounces a new offense, and the act under consideration is such a statute, should be strictly construed. A man ought not to be punished unless he falls plainly within the class of persons specified as punishable by such a law. The definition of offenses and the classification of offenders are legislative and not judicial functions, and where, as in the case at bar, a penal statute is plain and

> unambiguous, the courts may not lawfully extend it to a class of persons who are excluded from its effect by its terms, nor by interpolation or construction after their commission make acts offenses which were not clearly such by the expressed will of the legislative department. The creation of an offense by ex post facto construction is as pernicious as its creation by an ex post facto law. * * *"

It is therefore our thought that if the city treasurer of Edina, Missouri, disburses funds on warrants or orders of the board of aldermen after the end of July, 1951, and after the failure of the board of aldermen to publish the semi-annual financial statement of the city required by Section 79.160, supra, and the disbursement was made before the effective date of Section 79.165, supra, the treasurer cannot be prosecuted for the criminal offense defined by said section, since such disbursement was not a criminal offense at the time of the commission of the act. Said section is not an ex post facto law, and to hold that the treasurer is guilty of a violation of same and might be prosecuted for such offense, would be giving it an ex post facto construction which is as objectionable as the creation of an ex post facto law in the first instance.

In view of the fact that Section 79.165, supra, is not an ex post facto law, but one which operates prospectively, the treasurer cannot be prosecuted for the crime defined herein until after the effective date of the section. But if after said effective date the treasurer pays out city funds when the semi-annual financial statement has not been published prior to the payment, it is our further thought that he may be prosecuted for a violation of said section.

CONCLUSION

It is the opinion of this department that a treasurer of a fourth class city who pays out city funds on warrants or orders of the board of aldermen after the end of July, 1951, and before the effective date of Section 79.165,

Mr. Charles E. Murrell, Jr.

Laws of 1951, when the semi-annual financial statement of the city has not been published in accordance with Section 79.160, RSMo 1949, cannot be prosecuted for a crime of disbursing city funds in violation of Section 79.165, supra. The offense was not a crime at the time of its commission and said section not being ex post facto, it cannot be given an ex post facto construction, thereby authorizing a prosecution for its violation prior to October 9, 1951, the effective date. But after the effective date of Section 79.165, supra, if the treasurer of such a city pays out city funds on said warrants or orders of the board of aldermen when the semi-annual financial statement has not been published prior to the payment, as required by Section 79.160, supra, he may be prosecuted for violating the provisions of Section 79.165, supra.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PNC
hr

MOTOR VEHICLE REGISTRATION,) Under House Bill No. 211 an applicant
) for a license to operate a motor vehicle
) must show that he has paid his personal
PERSONAL PROPERTY TAX:) property taxes for the preceding year
) but need not show a tax receipt for any
) year previous to that.

FILED
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August 19, 1952 8/20/52

Mr. Charles E. Murrell, Jr.
Prosecuting Attorney
Knox County
Edina, Missouri

Dear Mr. Murrell:

We have given careful consideration to your request for an opinion, which request is as follows:

> "I would like an opinion from your office concerning House Bill No. 211, which provides that delinquent taxes for the year 1951 must be paid before an automobile may be registered or license issued to the automobile owner.
>
> "We have delinquent tax payers in this County, who have been delinquent on personnal taxes for a period of five years who now want to pay the taxes due for the year 1951 as required by House Bill No. 211.
>
> "I would like your opinion on whether or not the County Collector is required to or may accept payment of 1951 taxes without payment of taxes due for previous years."

House Bill No. 211, enacted by the 66th General Assembly of Missouri, is as follows:

> "Section 1. No state registration license to operate any motor vehicle in this state shall be issued unless the application for license is accompanied by a tax receipt or a statement certified by the county or town-

> ship collector of the county or township in which the applicants property was assessed showing that the state and county tangible personal property taxes for the preceding year have been paid by the applicant or that no such taxes were due.
>
> "Section 2. Every county and township collector shall give each person a tax receipt or a certified statement of tangible personal property taxes paid. Where no such taxes are due each such collector shall, upon request, certify such fact and transmit such statement to the person making the request. The director of revenue shall make necessary rules and regulations for the enforcement of this act, and shall design all necessary forms.
>
> "Section 3. This act shall become effective January 1, 1952."

This new law has not been construed, but the appellate courts of this state have laid down the rule that no construction is needed when the language of a statute is clear.

The Supreme Court of Missouri in Grier v. Railway Company, 286 Mo. 523, l.c. 534, said:

> "It is sometimes advantageous to recur to elementary principles. We deem it so now. The primary rule for the interpretation of statutes is that the legislative intention is to be ascertained by means of the words it has used. All other rules are incidental and mere aids to be invoked when the meaning is clouded. When the language is not only plain, but admits of but one meaning, these auxiliary rules have no office to fill. In such case there is no room for construction. * * *"

The wording of House Bill No. 211 seems to be entirely clear. It simply means that no registration or license to operate a motor vehicle shall be issued unless the applicant can show that his state and county taxes on tangible personal property "for the preceding year" have been paid. No mention is made of delinquent

taxes for previous years, and it is, therefore, evident that the legislature did not intend to apply the law to any year except the "preceding year."

Moreover, a taxpayer may pay his taxes for any one year without tendering payment for taxes due for other years. We are sending you, in support of this view, a copy of an opinion issued by this office in April this year to James L. Paul, Prosecuting Attorney of McDonald County, Missouri.

CONCLUSION

It is the opinion of this office that an applicant for registration or license to operate a motor vehicle, under House Bill No. 211, must in 1952 show that he has paid his state and county taxes on tangible personal property for the year 1951 but need not show a tax receipt or certified statement for any year previous to 1951.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

BAT/fh

Enclosure

ELECTIONS:
BALLOTS:

It is unlawful for a voter to attach a sticker containing the name of a person for whom the voter wishes to cast his vote printed thereon as provided in Section 111.580, RSMo 1949.

FILED
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September 18, 1952

9-18-52

Honorable Charles E. Murrell, Jr.,
Prosecuting Attorney of Knox
County
Edina, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads as follows:

"I would like an opinion from your office as to whether or not a name may be written in on the ballot at the General Election for an office for which there is not now a candidate and if the judges are required to count written in votes in such instances.

"In connection with the above question your attention is called to Subparagraph 2 of Section 111.580 R. S. Mo. 1949, which seems to indicate that a voter may vote for a 'write in' on a ballot but limits the 'write in' by providing for drawing of a line through the printed name of the candidate whose name appears on the ballot. The situation we have is one where there is no declared candidate for the office and therefore no printed name on the ballot.

"We would also like to know if there is any provision in the election laws for the placing of a name of a candidate on the ballot to be used at the General Election by the County Committee or any other body where there is no declared candidate for the office by the last day of filing for the office. In this connection I find no provision for such action in the present laws. I realize that it is possible that I may have overlooked such a provision in the statutes.

> "I would like also to have your opinion as to whether or not, in Missouri, a person seeking an office whose name does not appear upon the ballot, may have stickers made, the size of the space on the ballot for the office he seeks, having his name printed on one side with an X in a square before his name and the other side having glue on it so that the sticker may be glued to the ballot in the space provided for, for the office. In this connection, if a sticker can be used, what would be the effect if there is not a name on the printed ballot for the office?"

You first inquire whether a name may be written in on the ballot at the general election for an office where no candidate was nominated and consequently no name appears on the printed ballot. In this connection I am enclosing a copy of an opinion to the Honorable Samuel Semple, Prosecuting Attorney of Randolph County, October 21, 1948, holding that a voter may write in the name of a person he chooses for any office, regardless of whether or not there is a party nominee, and an opinion to the Honorable Arthur U. Goodman, Jr., Prosecuting Attorney of Dunklin County, September 23, 1944, holding that the ballot must contain a space for such office although no printed name will appear.

You next inquire as to whether or not the county committee or any other body may place the name of a candidate on the general election ballot where there is no declared candidate nominated at the primary for the office. I am enclosing a copy of an opinion to the Honorable Dwight H. Brown, Secretary of State, July 3, 1942, holding that no party committee would be authorized to fill a vacancy on its ticket after the primary except in a case where a vacancy occurs after the holding of the primary and such vacancy was caused by death or resignation of the candidate nominated and in no other case.

Your next inquiry deals with whether or not a person seeking an office whose name does not appear upon the ballot may have stickers made the size of the space on the ballot for the office he seeks, having his name printed on one side with an (X) in a square before his name, presumably so that the voter may attach the sticker in the space provided for, for the office. In this regard we direct your attention to Section 111.580, RSMo 1949, which provides in part as follows:

> "1. On receipt of his ballot the voter shall forthwith, and without leaving the enclosed space, retire alone to one of the voting booths so provided, and shall prepare his ballot for voting in the following manner:

* * * * * * * * * * * * * * * *

(2) If the voter desires to vote for one or more candidates whose name or names do not appear on the printed ballot he may do so by drawing a line through the printed name of candidate for such office, and writing below such canceled name the name of person for whom he desires to vote, and placing a cross mark in the square at the left of such name. The squares so marked shall take precedence over the cross marked in the circle.

* * * * * * * * * * * * * * * *

"3. It shall not be lawful to deface or tear a ballot in any manner nor to erase any printed name (except as provided above in this section), figure, word or letter therefrom, nor to erase any mark made thereon by such voter, nor enclose in the folded ballot any other paper or any article. If the voter deface or tear a ballot, or wrongly mark the name or make an erasure therein, he may obtain one additional ballot on returning to a judge in charge of the ballots the one so defaced or wrongly marked.

* * * * * * * * * * * * * * * *

As indicated by paragraph 1, subsection 2 of Section 111.580, and as discussed in the enclosed opinion, a voter may write in the name of a person for whom he desires to vote where there is no declared candidate and no printed name on the ballot in the space provided for the office. Paragraph 3 provides that it shall be unlawful to deface a ballot or to enclose any other paper or article with the folded ballot. We are of the opinion that the provisions of this section are mandatory, Hope v. Flentge, 140 Mo. 390, and that the provision for writing in the name of a person for whom the voter chooses to cast his vote may only be complied with by actually writing in the name and not by attaching a sticker.

We are further of the opinion that attaching a sticker would be in violation of paragraph 3, which provides that no paper or any other article shall be enclosed in the folded ballot.

CONCLUSION

Therefore, it is the opinion of this office that it is unlawful for a voter to attach a sticker containing the name of a person for

Honorable Charles E. Murrell, Jr.

whom the voter wisher to cast his vote printed thereon, as provided in Section 111.580, RSMo 1949.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DDG:hr

BONDS: Any money remaining over as the result of a special
SURPLUS: tax to retire county bonds after the retirement of said bonds shall be paid into the general revenue fund of such county.

FILED
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September 22, 1952

9/22/52

Honorable Charles E. Murrell, Jr.
Prosecuting Attorney
Knox County
Edina, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

> "A few years ago the County of Knox built a new Court House issuing bonds to pay for the construction of the building. It now appears that with the collection of the special tax to retire the bonds and for the payment of interest on the same, in the year 1953, there will be three or four thousand dollars excess of the fund needed to retire by bonds.
>
> "I would like to have your opinion as to what disposition can be made of the excess money in the special fund."

In regard to this matter, we would direct your attention to Section 108.180, RSMo 1949, which section reads:

> "When any bonds shall have been issued by any county, city, incorporated town or village, school district, or other political corporation or subdivision of the state, as provided under the constitution and laws of this state for the incurring of indebtedness, or for refunding, extending, unifying the whole or any part of their valid bonded indebtedness, the proceeds from the sale thereof and all moneys derived by tax levy, or otherwise, for interest and sinking fund

Honorable Charles E. Murrell, Jr.

> provided for the payment of such bonds, shall be kept separate and apart from all other funds of such governmental unit, so that there shall be no commingling of such funds with any other funds of such county, city, incorporated town or village, school district, or other political corporation or subdivision of the state; provided, that in no case shall the proceeds derived from the sale of any such bonds be used for any purpose other than that for which such bonds were issued, nor shall such interest and sinking fund be used for any purpose other than to meet the interest and principal of such bonds; provided further, that any bonds or money remaining in the interest and sinking fund of any such county, city, incorporated town or village, school district, or other political corporation or subdivision of the state, after the extinction of the indebtedness for which such bonds were issued, shall be paid into the general revenue fund of such county, city, incorporated town or village, or other political corporation or subdivision, and into the building fund of such school district."
>
> (Underscoring, ours.)

We believe that the underscored portion of the above section answers your question.

CONCLUSION

It is the opinion of this department that any money remaining over as the result of a special tax to retire county bonds after the retirement of said bonds shall be paid into the general revenue fund of such county.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HPWab

SOCIAL SECURITY:
COUNTY EMPLOYEES:
THIRD AND FOURTH
CLASS COUNTIES:

Section 51.415, enacted by the 66th General Assembly, applies to all counties of the third and fourth class which have entered into an agreement under Senate Committee Substitute for Senate Bill No. 3, to place county employees under the Federal Social Security Act. It is not void for being discriminatory.

April 7, 1952

4-7-52

Honorable Ralph Nevins
Prosecuting Attorney
Hickory County
Hermitage, Missouri

FILED
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Dear Sir:

This is in reply to your opinion request, which ~~is as~~ follows:

> "Does Section 51.415 restrict the payment of additional or increased salary to those counties of the third and fourth class who have entered into an agreement with the state agency to place county employees under the Federal Social Security Act?
>
> "The point I wish to raise is whether or not the provision of the section which limits the application to counties which have entered into an agreement with the state agency might be void because discriminatory."

The provisions of Section 51.415 not yet published in V.A.M.S. are contained in House Bill No. 549 of the 66th General Assembly. The relevant section of the above bill is as follows:

> "51.415. 1. In all counties of the third and fourth class which shall enter into an agreement with the state agency to place county employees under the Federal Social Security Act in accordance with the provisions of an act of the 66th General Assembly of the state of Missouri known as Senate Committee Substitute for Senate Bill No. 3, approved by the Governor, on, _____ 1951, it shall be the duty

> of the county clerk to keep necessary records, collect contributions of county employees and remit the same to the state agency, and do all other administrative acts required by the agreement or by ruling of the federal or state agency in order to carry out the purposes of the aforesaid act.
>
> "2. In addition to the compensation now provided by law for said county clerks, and in consideration of the additional duties imposed upon them by this act, they shall receive compensation payable in twelve equal monthly installments out of the county treasury in the following amounts:"

Section 1.090, RSMo 1949, is as follows:

> "Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."

The above seems to be definite and clear, at least in the following respect: That the county clerks in counties of the third and fourth class are required to keep the records in counties which have accepted the provisions of the Senate Committee Substitute for Senate Bill No. 3. It will be noted that such clerks are required to do several things which need not be repeated here. The second part of Section 51.415 provides compensation for the additional duties imposed upon said clerks.

In State v. Adkins, 284 Mo. 680, l.c. 693, the Court stated as follows:

> "* * * It is a fundamental rule of construction of all writings, whether they be laws, wills, deeds, contracts or constitutions, that they must be construed as a whole, and not in detached fragments; that they must be construed to effectuate and

> not to destroy their plain intent and purpose, and that in determining what is that intent and purpose all provisions relating either generally or specially to a particular topic are to be scrutinized and so interpreted, if possible, as to effectuate the intention of the makers. This rule does not need (though it does not lack) authority to give it vitality. It is inherent in the very nature of things, and springs from reason as Minerva sprang from the brain of Jove, full-grown and ready for battle."

The plan of the Legislature to establish directions to counties of the third and fourth class in the manner and means of the administration of the Old Age and Survivors Insurance provisions in Senate Bill No. 3 is clear and definite. It is also clear and definite that they, the Legislature, intended that the clerks of such counties be reimbursed for a task not required of counties which have not accepted the provisions of the said Senate Bill No. 3.

In regard to whether or not this statute is discriminatory, we must refer to Article VI, Section 8 of the Constitution of Missouri, 1945. It is as follows:

> "Classification of counties--uniform laws.--Provision shall be made by general laws for the organization and classification of counties except as provided in this Constitution. The number of classes shall not exceed four, and the organization and powers of each class shall be defined by general laws so that all counties within the same class shall possess the same powers and be subject to the same restrictions. A law applicable to any county shall apply to all counties in the class to which such county belongs."
> (Underscoring, ours.)

Since Senate Committee Substitute for Senate Bill No. 3 is directly referred to in Section 51.415, supra, the nature of that law should be considered here. Section 1, subsection 7, of Senate Committee Substitute for Senate Bill No. 3, provides as follows:

Honorable Ralph B. Nevins

> "'Political subdivision', any county, township, municipal corporation, school district, or other governmental entity of equivalent rank;"

Then in Section 5, subsection 1, it is provided as follows:

> "Each political subdivision of the state and each instrumentality of the state or of a political subdivision may submit for approval by the state agency a plan for extending the benefits of Title 2 of the Social Security Act to its employees, and are hereby authorized to, by proper ordinance or resolution, enter into and ratify any such agreement upon its approval as aforesaid. * * *"

The above law is certainly a general law as it is applicable to all counties of all classes. It can also be seen from the quoted sections that it includes even more political subdivisions than just counties.

Section 51.415, supra, quoted in part above, gives to the clerks of counties of the third and fourth class additional duties. Taking into consideration the purpose of the law to provide for the administration of another which gives to all counties of all classes a new and additional power, the purpose and extent of Section 51.415, supra, is definite and certain.

CONCLUSION

It is therefore the opinion of this department that the provisions of Section 51.415, supra, apply to clerks of counties of the third and fourth class who have entered into an agreement with the state agency to place county employees under the Old Age and Survivors Insurance Act. It is the further opinion of this department that Section 51.415 is not void because discriminatory.

Respectfully submitted,

JAMES W. FARIS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JWFab

TAXATION: STATE TAX COMMISSION:

State Tax Commission is required to apportion the property of a street railroad company to school districts levying taxes for library purposes and library districts based upon the length of line in the district as submitted by the company.



September 23, 1952

9-23-52

Honorable Charles C. Nance
Chairman
State Tax Commission of Missouri
Jefferson City, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads as follows:

> "I would like to obtain an official opinion of your department in regard to the following questions:
>
> > "1. Under the provisions of Section 151.080, R. S. Mo. 1945, as amended by House Bill 497, is the State Tax Commission required or authorized to apportion the property of a 'street railroad' company to library districts or school districts levying taxes for library purposes?
> >
> > "2. If the preceding question is answered in the affirmative, how is this apportionment made in view of the fact that apparently under Section 151.320, RSMo 1949, a street railroad company in their statement to the State Tax Commission are not required to state what property is located within a library district or a school district levying taxes for library purposes?"

Section 151.320 RSMo 1949, requires the president or other authorized officer of s street railroad company to submit to the State Tax Commission a statement of property, owned, used or leased by said company as follows:

> "On or before the first day of May in each year, the president or other authorized officer of every street railroad company in every city of this state whose line is now or shall hereafter become so far completed and in operation as to run electric cars, trolley cars, motorbusses, or cars propelled by any other device for the transportation of passangers, shall furnish to the state tax commission a statement duly subscribed and sworn to by said president or other authorized officer, before some officer authorized to administer oaths, setting out in detail the full length of the line, so far as completed, including branch or leased lines, the entire length in this state, the length of double or sidetracks, the length of such line located upon real estate to which such company may have title as right of way, the length of such line located upon the public streets or thoroughfares of any city, together with all cars, motors, grip cars, trolley cars, motorbusses, livestock, electric trolley wires, cables, cable conduits, powerhouses, stables and all other real property, and tangible personal property, owned, used or leased on the first day of January which may be used in or incident to the operation of such street railroad, the length of such line in each county, municipal township and city through or in which it is located, and the cash value of the several items embraced in the statement."

Section 151.330, RSMo 1949, provides that the property returned as required by the above section shall be subject to taxation and shall be assessed, apportioned, certified and the taxes collected in the manner which is now or may hereafter be provided by law for the assessment and taxation of other railroad property. This section is as follows:

> "The said property returned to the state tax commission, as by section 151.320 required, shall be subject to taxation for state, county,

> municipal and other purposes to the same extent as the real and tangible personal property of private persons, and the same shall be assessed, apportioned, certified and the taxes thereon levied and collected at the time and in the manner which is now or may hereafter be provided by law for the assessment and taxation of other railroad property."

There exists no specific statute dealing only with the assessment or apportionment of street railroad property for taxation purposes. The foregoing provisions require a street railroad company to make a return to the State Tax Commission of property, owned, used or leased by the company and such property shall be assessed and apportioned as provided for the assessment and taxation of other railroad property. We are therefore of the opinion that such property is apportioned as provided in House Bill 497, amending Section 151.080, RSMo 1949, setting forth the procedure for apportioning railroad company property. Said House Bill specifically provides for an apportionment to library districts and school districts which levy taxes for library purposes as follows:

> "Said commission shall apportion the aggregate value of all property herein specified belonging to or under the control of each railroad company, each county, municipal township, city or incorporated town, special road districts, library districts, school districts which levy taxes for library purposes pursuant to section 137.030 RSMo 1949, public water supply, fire protection and sewer districts or subdivision, except other school districts, in which such road is located, according to the ratio which the number of miles of such road completed in such county, municipal township, city or incorporated town, special road district, <u>library districts, school districts which levy taxes for library purposes</u> pursuant to section 137.030 RSMo 1949, public water supply, fire protection and sewer districts or subdivision, except other school districts, in which such road is located shall bear to the whole length of such road in this state; provided, that in any case where a company whose line or road is liable to taxation shall have been or may become consolidated into another corporation, entitled by its charter or otherwise to exemption from county or other taxation, that portion of the road which

(Underscoring ours.)

> is liable to taxation, as aforesaid, shall be assessed separately, and the value thereof apportioned to the counties, municipal townships, cities or incorporated towns, special road districts, library districts, school districts which levy taxes for library purposes pursuant to section 137.030 RSMo 1949, public water supply, fire protection and sewer districts or subdivision, except other school district, in which it is located; and the president or any authorized officer of each such railroad company shall in the annual statements rendered to the commission, as provided in section 151.020, include statement of the length of the road within school districts which levy taxes for library purposes pursuant to section 137.030 RSMo 1949 and library districts; provided, further, that in no event shall any school district levy school taxes, taxes for the erection of public buildings, or for other purposes except library purposes on the property herein specified, in any manner other than that provided for in section 151.150. (151.080, A.L. 1951 H.B. 497)."

This has long been the interpretation of the Supreme Court of Missouri which is evidenced by the case of State ex rel. School District v. Waddill, 330 Mo. 1118. In that case the court examined statutes substantially the same as those referred to above and concluded:

> "A reading of the three sections relating to the assessment and taxation of the property of street railroad companies in connection with those prescribing the method for the assessment and taxation of the property of other railroad companies leaves no doubt but that the property of the former, as described in said Section 10018, is required to be 'assessed, apportioned, certified and the taxes thereon levied' in the manner prescribed for the assessment and taxation of the distributable property of the latter. * * *"

We now turn to your second inquiry regarding the basis for the apportionment of street railroad property to library districts and school districts levying taxes for library purposes.

We note that House Bill 497, supra, requires the president or other authorized officer of a railroad company in its annual statement to the State Tax Commission to include a statement of

length of road within school districts levying taxes for library purposes and library districts. Since we already have pointed out a street railroad company is subject to the provisions of House Bill No. 497, we are of the opinion that they would likewise be required in their annual report to indicate the length of line in a library district and in a school district levying taxes for library purposes which, of course, would be the basis of the apportionment as therein provided.

CONCLUSION

Therefore, it is the opinion of this office that the State Tax Commission is required under the provisions of Section 151.330 RSMo 1949 and House Bill No. 497 of the 66th General Assembly, to apportion the property of a street railroad company to library districts and school districts levying taxes for library purposes.

We are further of the opinion that the apportionment shall be made in the manner prescribed in House Bill 497 based upon the length of line in the districts as indicated by the annual statement returned by the street railroad company as required by said bill.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DDG:hr

OFFICERS:
ASSISTANT PROSECUTING
ATTORNEY:

Assistant prosecuting attorneys in counties of the second class may sign informations either for felonies or misdemeanors.

FILED
68

April 3, 1952

4-3-52

Honorable A. M. Olmsted
Judge of the Magistrate Court
Second District
St. Joseph, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this department which reads as follows:

> "In counties the size of Buchanan do the Assistant Prosecuting Attorneys have the legal right to sign informations (when the Prosecuting Attorney is present at his office and in good health) either misdemeanor or felonies. If the Prosecuting Attorney is absent from the State does he have to designate one Prosecutor to act in his behalf by signing informations?"

You first inquire as to whether or not an assistant prosecuting attorney in counties of the second class can sign informations. Section 56.200, RSMo 1949, provides for the appointment of assistants to the prosecuting attorney in counties of the second class. Said section reads as follows:

> "The prosecuting attorney, in counties of the second class, shall be entitled to not more than three assistants. Such assistants shall be appointed by the prosecuting attorney, but no appointment shall be effective until approved by the judges of the circuit court of the county.

> They shall possess the same qualifications and be subject to the same fines and penalties for neglect of duty or misdemeanor in office as the prosecuting attorney. They shall be paid a salary, in such an amount, as shall be fixed by the prosecuting attorney and approved by the judges of the circuit court. The appointment, approval, and agreement as to salary of each assistant shall be in writing, signed by the judges of the circuit court and the prosecuting attorney, and filed by the prosecuting attorney with the county court."

Section 56.210, RSMo 1949, provides that when said assistants are appointed by the prosecuting attorney with the approval of the circuit judges of the county of the appointment and said appointment is filed with the county court, it is the duty of the county court to commission such assistant(s) "as other officers are commissioned by such court." Section 56.220, RSMo 1949, provides that said assistants "shall be commissioned for and hold their offices for the remainder of the term of the prosecuting attorney by whom they have been appointed." Although the terms assistant and deputy are not synonymous in their ordinary usage, since an assistant is not usually a sworn officer, while the term deputy connotes such meaning, we believe that the term assistant as here used in reference to the prosecuting attorney is synonymous with the term deputy.

The appellate courts of Missouri have repeatedly held that an assistant prosecuting attorney is a public official and not merely an assistant in the true sense of the term. State v. Hynes, 39 Mo. 569, Brown's Appeal, 69 Mo. App. 159, State v. Carey, 318 Mo. 813.

We have been unable to find any provision relating to the duties of an assistant prosecuting attorney in counties of the second class and therefore believe that the general rule that where the law authorizing the appointment of a deputy without any limitation on his power, such deputy may exercise any of the duties pertaining to the office for which he is appointed deputy. This rule is stated in 67 C. J. S., Officers, Section 15, page 451, as follows:

> "When the law authorizes an officer to appoint a deputy without any express limitation on his power, the duties of the office may be performed by either,

> and a deputy may exercise any of the duties pertaining to the office, as the necessity of convenience of the public may demand for their use, and this power may not be curtailed by the principal, unless the law expressly authorizes him to do so."

This rule was cited with approval in the case of Brown's Appeal, 69 Mo. App. 159, wherein the Kansas City Court of Appeals in considering the authority of an assistant prosecuting attorney to sign an information said:

> "* * *As said in Mechem's Offices and Officers (sec. 570): 'Where a public officer is authorized to appoint a deputy, the authority of that deputy, unless otherwise limited, is commensurate with that of the officer himself, and, in the absence of any showing to the contrary, it will be so presumed. Such a deputy is himself a public officer, known and recognized as such by law. Any act, therefore, which the officer himself might do, his general deputy may do also.'"

More specifically in regard to assistant prosecuting attorneys, the rule is again stated in 27 C. J. S., Section 30, District and Prosecuting Attorneys, page 448, as follows:

> "An assistant or deputy prosecuting attorney pro tempore, is generally clothed with all the powers and privileges of the prosecuting attorney, and all acts done by him in that capacity must be regarded as done by the prosecuting attorney himself."

In the case of Knuckles v. Board of Education of Bell County, 114 S. W. (2d) 511, the Court of Appeals of Kentucky was confronted with a somewhat similar question in determining the duties of an assistant superintendent of schools. In its opinion the court said:

> "The only place in our entire statutes wherein any reference is made to the position of assistant superintendents of public schools, is in section 4399-34 of the statutes, supra, saying: 'The board

> of education may, on the nomination of the superintendent of schools, appoint as many assistant superintendents as it deems necessary, whose compensation shall be fixed by the board and who may be removed for cause by the superintendent, with the approval of three members of the board of education.' That sentence is the only one in our statutory law that we have been able to find, or to which we have been cited, wherein any sort of reference is made to the position of 'assistant county superintendent.' Hence, there exists no statute expressly defining his duties. In such cases it is the undoubted duty of courts to conclude that he was to perform the duties of a 'deputy' superintendent, and to treat the words 'assistant' and 'deputy' as being synonymous in meaning when applied to the position under consideration. Mr. Bouvier in his law dictionary in defining the word 'deputy' says: 'In general, a deputy has power to do every act which his principal might do; but a deputy can not appoint a deputy. See Abrams v. Ervin, 9 Iowa 87; Lewis v. Lewis, 9 Mo. 183, 43 Am. Dec., 540; Confiscation Cases, 20 Wall. 92, 111, 22 L. Ed., 320.' Mr. Black in his law dictionary, in stating the meaning and scope of the word, says: 'A deputy has, in law, the whole power of his principal. Wharton.' We approved such definitions as applied to deupty clerks in the case of Ellison v. Stevenson, 6 T. B. Mon. 271. In that opinion, prepared for the court by Judge Bibb, it is said: 'It cannot be maintained as a legal principle, that the deputy, lawfully constituted as such, has less power than the principal.'* * *"

CONCLUSION

It is therefore the opinion of this department that an assistant prosecuting attorney in counties of the second class may legally sign informations for either felonies or misdemeanors since

their office is created by the laws of this state without any express limitation on their powers.

Since your first question has been answered in the affirmative, it is not necessary to answer your second question.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DDG:hr

CIRCUIT CLERK AND RECORDER, DEPUTIES: A deputy in the office of circuit clerk and recorder must reside in the county three months before appointment.

FILED
68

June 9, 1952

6/9/52

Mr. Gaylord P. O'Connor
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Mr. O'Connor:

We have given careful consideration to your request for an opinion, which request is as follows:

> "I would like to submit to you the following question for your opinion:
>
> "May the Recorder of Deeds and Ex-officio Circuit Clerk in a third class county appoint a Deputy Circuit Clerk who is not a resident of the County from which the Recorder was elected?"

Section 8 of Article VII of the Constitution of Missouri is as follows:

> "No person shall be elected or appointed to any civil or military office in this state who is not a citizen of the United States, and who shall not have resided in this state one year next preceding his election or appointment, except that the residence in this state shall not be necessary in cases of appointment to administrative positions requiring technical or specialized skill or knowledge."

It is herein provided that any public officer, with certain exceptions, must reside in the state one year next preceding his election or appointment. But nothing is contained in the Constitution to require prior residence in the county in which the officer is to serve. This is a matter to be determined by statute.

Section 59.300, RSMo 1949, is as follows:

> "The circuit clerk and recorder in counties of the fourth class, and in counties of the third class wherein the offices shall have been combined, as recorder of the county, may appoint in writing one or more deputies, to be approved by the judge of the circuit court, which appointment with the like oath of office as their principals, to be taken by them and endorsed thereon shall be filed in the office of the county clerk. Such deputy recorders shall possess the qualifications of clerks of courts of record, and may, in the name of their principals, perform the duties of recorders of deeds, but all circuit clerks and recorders and their sureties shall be responsible for the official conduct of their deputies."

This statute governs the appointment and qualifications of deputy circuit clerks and recorders in counties where the two offices are combined, and such deputies must have the same qualifications as clerks of courts of record.

Section 483.010, RSMo 1949, is as follows:

> "No person shall be appointed or elected clerk of any court, unless he be a citizen of the United States, above the age of twenty-one years, and shall have resided within the state one whole year, and within the county for which he is elected three months before the election; and every clerk shall, after his election, reside in the county for which he is clerk."

This statute, defining the qualifications of all clerks of courts of record, requires any such clerk serving as a county officer to reside in the county three months before his election, and this qualification applies to a deputy appointed under Section 59.300, supra.

These particular sections of the law have not been construed by the appellate courts of this state, but the rule of

construction has been defined in many cases. The Supreme Court of Missouri in State ex rel. v. Board of Education, 294 Mo. 106, l.c. 115, said: "It is also a cardinal rule that when the language is plain, there can be no construction because there is nothing to construe." We now hold that the language of the statutes quoted above is entirely clear, and the plain meaning of the law should be observed.

CONCLUSION

It is the opinion of this office that a deputy in the office of circuit clerk and recorder in a third-class county must reside in the county three months before being appointed to such office.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

BAT/fwh

CIRCUIT COURTS:
SUPPORT OF DEPENDENTS:
UNIFORM LAW:

A person proceeding under the Uniform Support of Dependents Law would be required to file security for costs or a deposit if a nonresident, and would be subject to the rules of the circuit court in regard to costs where a resident.

FILED
68

November 21, 1952

Honorable Phelim O'Toole
Clerk of the Circuit Court
Civil Courts Building
St. Louis, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office which request reads in part as follows:

"Chapter 454 - Uniform Support of Dependents Law.

"We have received about twenty petitions from about ten different states under reciprocal support of dependents laws.

"We have four or five local attorneys who want to file petitions in this Court under Chapter 454. The question of costs seems to be the 'fly in the ointment.' Our Judges in General Term suggested that in either case, that is, where Missouri is the initiating or the responding state, that a deposit of costs should be made in the amount of $14.00.

* * * * * * * * * * *

"There is nothing mentioned in our law about the matter of costs. We do not think that we have the authority, under our Statutes, to accept these petitions either as the initiating or as the responding state, without a deposit for costs.

> "We would like to have an opinion from you on this question, at your convenience. At the present time, we do not know how to proceed."

The Uniform Support of Dependents Law (Chapter 454, RSMo 1949), is a reciprocal law providing a method of enforcing the duty of support in cases where the obligor is not present and within the jurisdiction of the courts of the state where the duty arose. Said law is rather lengthy and we do not deem it necessary for the purpose of this opinion to set it forth in its entirety.

Section 454.090, RSMo 1949, provides for the commencement of an action for support by the filing of a petition as follows:

> "All duties of support are enforceable by an action commenced by the filing of a petition irrespective of relationship between the obligor and obligee. Jurisdiction of all proceedings hereunder shall be vested in circuit court."

Section 454.110, RSMo 1949, provides that if the court acting upon said petition finds that it sets forth facts from which it may be determined that the obligor owes a duty of support and that the court of the responding state may obtain jurisdiction of the obligor or his property, it shall also certify to the responding state as follows:

> "If the court of this state acting upon a petition filed therein by this state as an initiating state finds that the petition sets forth facts from which it may be determined that the obligor owes a duty of support and that a court of the responding state may obtain jurisdiction of the obligor or his property, it shall so certify and shall cause certified copies of the petition, the certificate and an authenticated copy of this chapter to be transmitted to the court of the responding state."

Taking first your question where the action was commenced in another state and the obligor is present or has property in this state, we refer you to Section 514.010 which provides as follows:

> "In all actions on office bonds for the use of any person, actions on the bonds of executors, administrators or guardians, qui

> tam actions, actions on penal statutes when the penalty is given to the informer, and in all civil cases when the plaintiff or person for whose use the action is to be commenced shall not be a resident of this state, the plaintiff or person for whose use the action is to be commenced shall, before he institutes such suit, file with the clerk of the court in which the action is to be commenced the written undertaking of some person, being a resident of this state, whereby he shall acknowledge himself bound to pay all costs which may accrue in such action; and if any such action shall be commenced without filing such undertaking, or depositing with the clerk of the court in which said suit is brought, a sum of money sufficient to pay all costs that may accrue in the case, subject to be increased at any time, whenever the court may deem proper, and by its order of record require, the court, on motion, may dismiss the same, unless such undertaking be filed or sum of money be deposited before the motion is determined, and the attorney of the plaintiff shall be ruled to pay all costs accruing therein."

The action provided in Chapter 454 to be commenced by the filing of a petition as outlined above and as distinguished from the provisions of said chapter relating to extradition is a civil proceeding and of course, in such a case as here considered, the proceeding instituted in the courts of this state is one in which the plaintiff is a nonresident and we are of the opinion that under the above provision, security for costs or a deposit would be required, except in cases where the plaintiff should be allowed to sue as a pauper as provided in Section 514.040.

We turn now to your other question where Missouri is the initiating, rather than the responding state. We assume that the deposit for costs in the amount of $14.00 to which you have referred, is authorized and in conformity with rules of the circuit court. It is well established that courts have inherent power to make rules of practice to regulate their proceedings in the administration of justice. The rule is stated in the case of State v. Miller, 241 S.W. 920, as follows:

> "It is beyond question that courts have an inherent power to prescribe rules of practice to regulate their proceedings in the administration of justice."

Honorable Phelim O'Toole

Section 478.397, RSMo 1949, gives to the Circuit Court of the City of St. Louis certain rule making power as follows:

> "And in addition to the ordinary power of making rules conferred by the general law, the court may make all rules which its peculiar organization may, in its judgment, require, different from the ordinary course of practice, and necessary to facilitate the transaction of business therein. But all rules for the government of the court at special term shall be the same before each of the judges at such term."

Under the foregoing, we are of the opinion that a person initiating an action for support in the courts of this state as provided by Section 454.090, supra, would be required to make a deposit for costs in such amount as is prescribed by the rules of the court. We do not undertake to pass upon the validity of such a rule or the amount of deposit required by such rule.

CONCLUSION

Therefore, it is the opinion of this office that under the civil proceeding authorized by the Uniform Support of Dependents Law, a person or persons using the courts of this state as the responding state in an action commenced by the filing of a petition, would be required to file a security or deposit for costs as required by Section 514.010, RSMo 1949, since the person in whose name the action is commenced or for whom it is commenced would be a nonresident.

We are further of the opinion that when an action for support is commenced in this state as the initiating state, the person initiating the action would be subject to any rules of court not inconsistent with existing statutes and not arbitrary, discriminatory or unreasonable requiring a deposit for costs.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DDG:hr

COUNTIES: County budget law, Sections 50.670 to 50.740, RSMo 1949, applicable to fourth class counties, does not
BOND ISSUES: authorize bond issue to retire unpaid county warrants. Section 108.130, RSMo 1949, authorizes fourth class counties to fund any judgment indebtedness resulting from the issuance of unpaid county warrants.

March 21, 1952



3-21-52

Honorable James L. Paul
Prosecuting Attorney
Mc Donald County
Pineville, Missouri

Dear Mr. Paul:

The following opinion is rendered in reply to your request which reads as follows:

> "It has been brought to my attention recently, that the County of McDonald, has been using current receipts for the year 1951, to pay back warrants of 1950; current receipts for 1950 to pay back warrants of 1949, etc. In their budget they have not been showing these outstanding warrants as unpaid at the beginning of each current year.
>
> "A recent check reveals that at the close of 1951, there will be approximately $27,000.00 in outstanding warrants issued in 1951, which are unpaid.
>
> "I would, therefore, appreciate you furnishing me an opinion whether under the present budget law, a County of the fourth class, such as McDonald County, can vote a bond to pay these outstanding warrants, so that they can get on a current operating basis for the coming year.
>
> "In view of the urgency, of this situation and the making of the budget the first of February, an early reply will be greatly appreciated."

The county budget law applicable to counties of the fourth class is found at Sections 50.670 to 50.740, RSMo 1949. Investigation discloses that McDonald County is a county of the fourth class. Sections of the county budget law, above referred to, do not provide for the issuance of bonds to pay unpaid obligations of previous years.

This department is not in a position to pass upon the legality of warrants issued by McDonald County in 1951 in the amount of $27,000 and which remain unpaid as of this date, as disclosed in the request for this opinion. We have found no specific statutory provision authorizing a bond issue to retire outstanding warrants issued by the county court, but we do call your attention to Section 108.130, RSMo 1949, which provides as follows:

> "The several counties and municipalities of this state are hereby authorized to fund any judgment indebtedness of such county or municipality and to issue bonds therefor as provided by the general law governing the issuance of bonds by counties and municipalities respectively. The issuance of such funding bonds under this section shall be deemed and held by all courts in this state, to all intents and purposes, the incurring of a new indebtedness; and thereafter no question shall ever be raised in any court as to the validity of such indebtedness, except questions of constitutional limitation of indebtedness. Such funding bonds shall not be exchanged or delivered in payment of such judgment indebtedness nor any part thereof. The provisions of this section shall not be deemed to be repugnant to nor inconsistent with section 108.140; but the power and authority hereby conferred shall be deemed to be cumulative thereof."

The above quoted statute contains ample authority for the requisite number of qualified electors of McDonald County to petition the county court of said county to call an election for the purpose of voting a bond issue to retire any judgment indebtedness that may result from the issuance of $27,000 worth of outstanding county warrants issued in 1951.

Honorable James L. Paul

CONCLUSION

It is the opinion of this department that Sections 50.670 to 50.740, RSMo 1949, being the county budget law applicable to fourth class counties, contains no provision authorizing the fourth class county to vote a bond issue to retire unpaid county warrants, but Section 108.130, RSMo 1949, contains authority permitting a fourth class county to fund any judgment indebtedness resulting from the issuance of any unpaid county warrants.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:ba

SPECIAL ROAD DISTRICT:
WARRANTS: COMMISSIONER'S
POWER TO ISSUE:

Where special road district commissioners of non-township organization county issue a warrant on the county treasurer for all district's funds; deposit proceeds in a bank and issue checks for district's obligations, Commissioner's actions illegal and violates Sec.233,185 RSMo 1949, as custody cannot be changed from treasurer. Commissioners elected or appointed under Sec. 233.180 RSMo 1949, do not forfeit office, hold to end of term. Commissioners not guilty of crimes under any Missouri statutes.

FILED
69

April 8, 1952

4-9-52

Honorable James L. Paul
Prosecuting Attorney of
McDonald County
Pineville, Missouri

Dear Sir:

Your recent request for a legal opinion of this office has been received and reads as follows:

"Please furnish this office with an opinion covering the following questions:

"Section 233.185 of the Revised Statutes of the State of Missouri, provides that the Treasurer of the County is the official Treasurer of a special road district organized under a non-township organization, and is authorized to pay warrants when duly signed by the designated members of the commission.

"Where a warrant is drawn for the lump sum and the County Treasurer acknowledges said warrant and said lump sum is then redeposited in a banking institution, against which sum the commission issues checks in payment of obligation, is such action the violation of the provisions of the above section?

"If such is a violation of the above section, upon proper showing, are the officer's issuing

said warrants disqualified from further serving and/or is the County Treasurer liable for proper accounting of said lump sum so drawn?

"In the event that such is a violation of the provisions of the above quoted section, does such constitute a criminal act?

Section 233.185, RSMo 1949, provides how the commissioners of a special road district, in a non-township organization county shall organize, and also provides how the funds of the district shall be kept, and how paid out. Said section reads as follows:

"1. The commissioners so appointed and qualified shall meet at such a time and place within such district as may be fixed by the county court at the time of appointing them, or as they may in writing agree upon, and shall organize by electing one of their number president, another vice-president and another secretary; provided, that by a unanimous vote of said commissioners any person not a member of said board may be chosen secretary.

"2. Meetings of said commissioners shall be held thereafter at such time and place as they may agree upon in writing, or the president or vice-president may order. The treasurer of said board shall be the county treasurer, and he shall be responsible on his bond for the faithful keeping of all moneys deposited with him by reason of this law. The president of the board shall preside at all meetings thereof; he shall sign the minutes and records of the board, and all warrants that may be drawn upon the treasury for the payment of any money out of the treasury on account of the funds belonging to said district, and exercise a general supervising control over the work of such commissioners, and in a general way may do all the acts and things that the said board may empower him to do, and such others as may be authorized by law. During absence of the president from the county, or from any meeting of the board, the vice-president shall perform the duties herein conferred upon the president.

> "3. The secretary shall carefully keep a true record of all warrants drawn on the treasurer and all written contracts that may be entered into on behalf of the district, shall attest such warrants and the execution of such contracts, keep minutes of meetings of the board, and perform such other duties as the law may require. All money paid to the county treasurer and placed to the credit of the district shall be paid out only on warrants signed by the president or vice-president and attested by the secretary, except as may be otherwise authorized by law."

It is noted that this section provides that all the funds of the district shall be kept in the county treasury and can only be paid out by warrants of the commission on the treasurer, and that said warrants must be signed by the president or vice-president and secretary, and it is with this phase of the statute that your inquiry deals.

You fail to give the facts in detail in your letter, but from those given we assume that a warrant of the commissioners of the special road district was issued in accord with the provisions of above section, on the county treasurer, and that the proceeds of the warrant were deposited in a bank account in the name of the district, and that checks were only written on said account to pay the obligations of the district.

We interpret your inquiry to be whether the action of the commissioners in issuing the warrant for the total amount of funds in the county treasury, and redepositing the proceeds in a bank and issuing checks on the account for the district's obligations is a violation of Section 233.185, supra. In other words did the commissioners violate this section when they changed the custody of the district's funds from the county treasurer to the bank?

Before attempting to discuss this matter further and reaching a conclusion herein, we call attention to the case of Special Road District No. 4, et al. v. Cantley, 223 Mo. App. 89. The facts and principles of law involved here are very similar to those in the present case, and we quote a part of the opinion found at l. c. 92, in which the court said:

> "Whether or not the common-law doctrine could be invoked by a political subdivision of the State so as to entitle it to a preference, in the absence of statute, is

questionable. However that may be, in the case at bar there is a statute relied upon by both plaintiff and defendant as upholding their respective theories. Section 10836, article 8, chapter 98, Revised Statutes 1919, relating to special road districts, provides for the organization of the board of commissioners. It further provides that, 'The treasurer of said board shall be the county treasurer, and he shall be responsible on his bond for the faithful keeping of all moneys deposited with him by reason of this law. All money paid to the county treasurer and placed to the credit of the district shall be paid out only on warrants signed by the president or vice-president and attested by the secretary, except as may be otherwise authorized by law.' Defendant asserts that under the terms of this statute the board of commissioners has authority to draw warrants on the funds of the road district and, no provision being made for a depository, it was not illegal for the commissioners to make the deposit in question. Under the agreed statement of facts it appears that what the road commissioners actually did was to transfer the sum of two thousand dollars from the county treasurer (the officer named by the statute as custodian of the funds of the road district), to the account of the special road district, by drawing a warrant in proper form payable to the Bank of Louisburg and depositing same to the credit of the special road district. The authority of the commissioners to draw the warrant cannot be successfully denied. That authority is conferred by the statute referred to. But the commissioners certainly have no authority to draw warrants on the county treasurer for the purpose of making another person or institution custodian of the funds of the district. Such an act would nullify the statute. The evident purpose of the law is to protect the funds of the district by making the county treasurer responsible, under bond, for the faithful keeping of all moneys deposited with him. When moneys are taken from his hands they no longer have that protection. No other person or persons had the right to make deposits for the special road

> district. If the warrant as drawn was the property of the road district the county treasurer automatically became the sole lawful custodian thereof. It is conceded the warrant drawn in favor of the Bank of Louisburg did not transfer any beneficial interest to that bank, but the proceeds of the warrant continued to be moneys belonging to the district. The only fair inference is that the object of the transaction was to take the district's money from the hands of the county treasurer and place it in a separate account over which he had no control. This was an unlawful act and created a trust ex maleficio. The defendant is charged with knowledge of the terms of the statute. Under such circumstances the relation of debtor and creditor was not created and plaintiff had the right to recover its property from the insolvent bank of the commissioner. * * *"

It was pointed out in the above quoted portion of the court's opinion that the commissioners had the power to issue warrants on the county treasurer and to order their payment out of any funds in his hands to the credit of the district, but that the commissioners had no authority to issue a warrant for the total amount of the district's funds and to redeposit said funds in a bank and thereby make another person or institution the custodian of said funds. The county treasurer is the officer who has a right to make deposits and to keep the district's funds, under the statute, and he is responsible on his bond to faithfully keep said funds.

Section 233.185, supra, makes the county treasurer the only custodian of the special road district's funds referred to in the opinion request, and for which funds he is bound to faithfully keep and account for, under the conditions of his official bond. Under this section it is his duty to pay all warrants legally issued by the commissioners from any funds of the district in his hands, in the manner provided by law.

It is further noted that under the provisions of Section 233.185, supra, and the ruling in the case of Special Road District No. 4 v. Cantley, supra, the commissioners have the power to issue warrants for the obligations of the district, but lack the power and cannot legally issue a warrant for the total amount of the district's funds in the treasurer's hands, and then deposit the proceeds in a bank to the credit of the district, thereby changing the custody of said funds from the county treasurer to a bank.

Therefore, in answer to your first inquiry it is our opinion that the commissioners were without power to issue the warrant for the total of the district's funds, and to change the custody of said funds from the legal custodian to a bank, and that their action in so doing was a violation of Section 233.185, supra.

Section 233.180, provides how the commissioners of a special road district are selected and reads as follows:

> "1. At the term of court in which such order is made, or at any subsequent term thereafter, the court shall appoint three commissioners, who shall be residents of the district and owners of land within the district, who shall hold their office until the first Tuesday after the first Monday in January thereafter; and on said date the voters of the district, at an hour and place to be fixed by said commissioners, shall elect three commissioners, one of whom shall serve one year, one for two years and one for three years, and on the first Tuesday after the first Monday in January each year thereafter they shall elect a commissioner to take the place of the one whose term is about to expire, who shall serve three years.
>
> "2. No person shall be elected or appointed commissioner who is not a resident of the district and an owner of land in the district. Any vacancy caused by resignation, death, removal from the district of a commissioner or sale of all land owned by him in the district shall be filled for the unexpired term by election by the voters of the district. All commissioners shall qualify by taking, subscribing and filing with the county clerk the oath prescribed by the constitution of this state, and that they will faithfully, honestly and impartially discharge their duties as commissioners according to law.
>
> "3. If for any reason the board of commissioners herein mentioned shall fail to call an annual or other prescribed election to fill a vacancy or vacancies caused by the expiration of the term of any one or more of the commissioners, then the county court is hereby authorized and required to

> call an election to fill said vacancy and to fix the time therefor within fifteen days after making the order for such election."

This section does not provide that a commissioner of a special road district shall forfeit his office after he has participated in the act of illegally changing the custody of the district's funds under the same or similar circumstances referred to above. A forfeiture of the office cannot be implied, and such commissioners will continue to serve in their official capacities until the end of the terms for which they were elected or appointed under the provisions of above quoted section, consequently, our answer to your second inquiry is in the negative.

Your last inquiry is whether the violation of the provisions of above section (233.185, supra), constitutes a criminal act.

Section 556.010, RSMo 1949, defines the terms "crime" and "criminal offense", and reads as follows:

> "The terms 'crime', 'offense,' and 'criminal offense,' when used in this or any other statute, shall be construed to mean any offense, as well misdemeanor as felony, for which any punishment by imprisonment or fine, or both, may by law be inflicted."

From the reading of this section it appears that a crime can only be an offense defined as a felony or misdemeanor by statute, and for which some punishment has been provided for its violation, since there are no "implied crimes," in Missouri.

It appears that no section makes it a crime to violate the provisions of Section 233.185, supra, or to illegally change the custody of a special road district's funds from the county treasurer to another officer, person or institution. Therefore, in answer to your last inquiry, it is our opinion that the commissioners of the special road district cannot be prosecuted and punished for their illegal actions, since said actions have not been defined as crimes under the provision of any Missouri statute.

CONCLUSION

It is therefore, the opinion of this department that in a non-township organization county when the commissioners of a special road district issue a warrant for the total amount of all funds in

the county treasury to the credit of the district; deposit the proceeds in a bank and write checks upon the deposit in payment of the district's obligations; the action of the commissioners is illegal and a violation of Section 233.185, RSMo 1949. Said section does not authorize the commissioners to change the custody of the district's funds from the county treasurer, who has been designated the lawful custodian, to any other officer, person, or institution. The commissioners were elected or appointed under the provisions of Section 233.180, RSMo 1949, and will continue in office until the end of the terms for which they have been elected or appointed, since said section does not provide that when commissioners are guilty of illegally changing the custody of the funds of their district, they shall forfeit their offices.

It is the further opinion of this department that under the above mentioned circumstances, the illegal actions of the commissioners, do not constitute crimes, since no criminal statutes of Missouri, define said actions to be criminal offenses.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PNC:hr

TAXATION: A taxpayer may pay any years taxes without tendering payment of taxes due for other years.

FILED
69

April 29, 1952

Honorable James L. Paul
Prosecuting Attorney of
McDonald County
Pineville, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this department, which request reads as follows:

> "Where a person is delinquent on real and/or personal taxes for a period of years within the five year statute of limitations, may a delinquent tax payer pay any of the year's taxes he desires, without tendering payment for the years delinquent prior to the year he is tendering payment?"

We have been unable to find any statutory or case authority dealing with the question as to whether or not a person delinquent on real and/or personal taxes for a period of years may pay any of the year's taxes without tendering payment for the years prior or subsequent to the years taxes which he wishes to pay. However, we find authority from other jurisdictions dealing with this question, which although not binding upon the courts of this state, is at least persuasive.

The general rule in regard to paying taxes due for any one year without tendering payment for taxes due in other years is found in 51 Am. Jur., Taxation, Section 958, page 841, as follows:

> "Although a taxpayer ordinarily has no right, in the absence of a statute giving him such right, to make partial payment of any entire tax upon a single piece of property, the general rule is that where

> separate and independent taxes have been levied against the property of a taxpayer, he has a right to pay the full amount of any one tax without paying the others; that is, he may pay the amount of any one tax listed against him or the tax on any one item or piece of property which has been separately assessed, without offering to pay taxes on other parts. Such right is not restricted to cases in which the taxpayer contends that the taxes not proffered are invalid and unenforceable. The right to make such payment may be enforced by mandamus. * * *"
>
> (Underscoring ours.)

See also 61 C. J., Taxation, Section 1244, page 965, wherein the rule is stated as follows:

> "But where the taxes are separable the rule against part payment does not apply, and the citizen always has the right to pay the amount of any one tax listed against him, while refusing or omitting to pay others, or to pay the taxes for one year, and contest those assessed for other years, * * *."
>
> (Underscoring ours.)

Dealing first with delinquent taxes on realty, we refer you to the cases of Olmstead County v. Barber, 31 Minn. 256, 17 N. W. 473, and Duvall v. Perkins, 77 Md. 582, 26 Atl. 1085. In the Barber case the Supreme Court of Minnesota, in its opinion said:

> "On the argument there was some discussion as to the right of defendants to pay the tax of 1881, without at the same time paying the other. There can be no doubt of that right. An owner of property may always pay the taxes for any year, and contest those claimed to be against it for other years."

In the Perkins case the court held that the refusal of a taxpayer to pay interest accruing on taxes against his land for

certain years does not justify the tax collector in refusing to accept a tender of the amount due for taxes in other years.

Turning now to your question in regard to delinquent personal property taxes. In the case of Baltimore v. Fine, 148 Md. 324, 129 Atl. 356, the court held that each yearly tax is an independent demand and therefore claims for two or more years are separate and severable, the court in its opinion said:

> "Because a tax is a charge imposed upon the taxpayer as an act of sovereignty, without his consent, and for the public use, it is not a debt or of the nature of a debt (Bonaparte v. State, 63 Md. 470, 471), yet, it is sufficiently similar to afford an analogy in support of the better rule with respect to the payment or tender of taxes. This rule is that, unless otherwise permitted by statute, the whole amount due for any single tax must be paid or tendered; but if there are separate and distinct taxes due, the taxpayer is not compelled to pay their aggregate amount but may pay one or more of such separate and distinct taxes, at his election. 3 Cooley on Taxation (4th ed.), secs. 1251-1253; Tracey v. Irvin, 18 Wall. (U. S.) 549.
>
> * * * * * * * * * * * * * *
>
> "It is a necessary consequence of the nature of the obligation of the taxpayer and of these statutory provisions that the yearly taxes due under the single and distinct municipal and state levies, at the ordained and enacted respective rates, upon the same total assessment against the appellee, may constitute but one entire annual demand. <u>But inasmuch as every yearly tax is an independent demand, the claims for two or more years are separate and severable</u>. Duvall v. Perkins, 77 Md. 582, 589."
>
> (Underscoring ours.)

We are of the opinion that the holding of the Fine case, in regard to personal property taxes, that each yearly tax is an independent demand and therefore separate and severable, would be applicable to real property taxes. (Duvall v. Perkins, supra.)

Honorable James L. Paul

CONCLUSION

Therefore, it is the opinion of this department that real and/or personal property taxes are separate and severable from the taxes due for other years and a taxpayer may pay any year's taxes without tendering payment of taxes due for other years whether subsequent or prior thereto.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DDG:hr

STATUTES:
LEGAL PUBLICATION:

The general printing statute and the delinquent tax statute in regard to the cost of publication of delinquent lands must be read and construed together.

FILED
69

September 30, 1952

10/1/52

Honorable James L. Paul
Prosecuting Attorney of
McDonald County
Pineville, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads as follows:

> "Please furnish this office with as early an opinion as is possible on the following question. 'Does Section 493.030 of the Revised Statutes of the State of Missouri, 1949, repeal sub-paragraph 5 of Section 140.170 of Revised Statutes of the State of Missouri, or inasmuch as paragraph 5 of Section 140.170 pertains to a special contract and apparently Section 493.030 applies to general publication, is Section 5, applicable on delinquent tax lists?'"

The two provisions to which you have referred and about which you inquire read as follows; Section 493.030 states:

> "When any law, proclamation, advertisement, nominations to office, proposed constitutional amendments or other questions to be submitted to the people, order or notice shall be published in any newspaper for the state, or for any public officer on account of or in the name of the state, or for any county, or for any public officer on account of, or in the name of any county, there shall not be charged by or allowed to any such newspaper for such publications a higher rate than ten cents per line for each insertion, the lines to be two inches

> long and to be set in type occupying twelve lines to the column inch, fractional lines to be charged and paid for as one line; provided; however, that where any law authorizing and requiring the publication of any such law, proclamation, advertisement, nominations to office, proposed constitutional amendments or other questions to be submitted to the people, order or notice, shall require the use of a type having a body larger than six point, or more than one size of type, or the use of any emblem, or the spacing of lines so as to have a blank space between the lines, said printing shall be paid for by the inch of space used, single column of twelve ems pica wide, which price per inch shall not exceed the rate of one dollar per inch, single column of twelve ems pica wide, for each insertion. When any law, proclamation, advertisement, nominations to office, proposed constitutional amendments, or other questions to be submitted to the people, order or notice, shall be required by law to be published in any newspaper, the rates herein specified shall prevail, and all laws or parts of laws in conflict herewith, except sections 493.070 to 493.090, are hereby repealed."

Paragraph 5 of Section 140.170 reads as follows:

> "5. The expense of such printing shall be paid out of the county treasury and shall not exceed the rate fixed in the county printing contract, if any, but in no event to exceed one dollar for each description, which cost of printing at the rate paid by the county shall be taxed as part of the costs of the sale of any land or lot contained in such list."

Paragraph 5 of Section 140.170, supra, relates to the publication of lands and lots sought to be sold for delinquent taxes.

In answer to your inquiry we would like to set forth certain rules of statutory construction contained in the case of State v. Malone, 192 S.W. 268, which we believe to be applicable. They are as follows:

> "Repeal of statutes by implication is not favored. (State ex rel. St. Louis Police Relief Ass'n v. Igoe, 107 S.W. (2d) 929,

340 Mo. 1166; Graves v. Little Tarkio Drainage Dist. No. 1, 134 S.W. (2d) 70, 345 Mo. 557; Coleman v. Kansas City, 156 S.W. (2d) 644, 348 Mo. 916; Lajoie v. Central West Casualty Co. of Detroit, 71 S.W. (2d) 803, 228 Mo. App. 701.)

"The repeal of a statute by a subsequent statute is a question of intention, and there is a presumption against the intention to repeal where express terms are not used. (State ex rel. St. Louis Police Relief Ass'n v. Igoe, supra.)

"If by any fair interpretation all the sections of the statutes can stand together, there is no repeal by implication. (Hull v. Baumann, 131 S.W. (2d) 721, 345 Mo. 159.)

* * * * * * * * * * * * * *

"But though two acts are seemingly repugnant they must, if possible, be so construed that the later will not operate as a repeal, by implication, of an earlier one and if they are not irreconcilably inconsistent, both must stand. (Graves v. Little Tarkio Drainage District No. 1, supra.)

"The repugnancy between the later and the prior statutes must be wholly irreconciable in order to work a repeal of the prior act. (State ex rel. Wells v. Walker, 34 S. W. (2d) 124, 326 Mo. 1233; Use of Geo. B. Peck Co. v. Brown, 105 S.W. (2d) 909, 340 Mo. 1189; Graves v. Little Tarkio Drainage Dist. No. 1, supra; State ex rel. City of Republic v. Smith, 139 S.W. (2d) 939, 345 Mo. 1158.)"

Viewing the above two sections together under the above rules, we do not believe that Section 140.170, paragraph 5 is repealed by Section 493.030, RSMo 1949, inasmuch as there exists no irreconciable conflict between the two provisions. Both of these provisions are limitations upon the amount that may be expended for the publication of legal notices, etc. Section 493.030, RSMo 1949, specifies the maximum amount that may be expended and Section 140.170, RSMo 1949 specifies an amount not to be exceeded in the publication of lands and lots sought to

be sold for delinquent taxes. The later section does not purport to set a maximum in violation of the former, but acts as a limitation only upon the amount that may be expended for publication of this type. In other words, an amount might be allowed by Section 493.030, RSMo 1949, which would exceed the maximum allowable amount specified in Section 140.170 and of course, would act as a limitation thereon. Viewed in this manner, there of course, would exist no conflict between the above two sections.

CONCLUSION

Therefore, it is the opinion of this office that Section 493.030, RSMo 1949, does not repeal by implication or otherwise, Section 140.170, RSMo 1949, since there does not exist an irreconciable conflict. The later provision merely acts as a limitation upon the maximum allowable amount as indicated by the former, the maximum not to exceed the amount set in either of the two sections whichever is the lesser.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DDG:hr

SHERIFF'S BOND:
STATUTES:

The provisions of the Missouri statutes relating to the giving of a bond by a sheriff elect is to be construed as simply directory and would not by their own force create a vacancy in office.

FILED
69

December 8, 1952

12-9-52

Honorable James L. Paul
Prosecuting Attorney of
McDonald County
Pineville, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads in part as follows:

> "Please furnish me with and * * * opinion if Sections 57.020 and 57.040 of Revised Statutes of the State of Mo. 1949 construed together are mandatory or directive. * * *"

Sections 57.020 and 57.040, RSMo 1949, deal with the official bond of a duly elected sheriff and the failure to give such bond. Said sections read as follows:

> "57.020. - Sheriff to give bond. - Every sheriff shall, within fifteen days after he receives the certificate of his election or appointment, give bond to the state in a sum not less than five thousand dollars nor more than fifty thousand dollars, with sureties approved by the circuit court, conditioned for the faithful discharge of his duties; which bond shall be filed in the office of the clerk of the circuit court of the county.
>
> "57.040. - Failure to give bond, effect. - If any sheriff fail to give such bond within the time prescribed, the office shall be deemed vacant."

It is noted that Section 57.020 provides that a duly elected sheriff is to give bond to the state, conditioned upon the faithful performance of his duties, within fifteen days after receiving his certificate of election. Is such a statute considered by itself mandatory or directory or would it receive a like interpretation when considered with Section 57.040? This question must be resolved by the construction of our statutes. Such provision as Section 57.020 have almost universally been held to be simply directory. Mechem on Public Officers. In the case of State ex rel. Attorney General v. Churchill, 41 Mo. 41, the Supreme Court of Missouri, in considering a treasurer elect's right to office where he had failed to give bond within ten days after the election as required by statute, stated the rule as follows:

> "* * *The bond was not void, nor voidable, merely because not presented and filed within the ten days. This provision of the statute is directory only. The matter of time was not essential to the validity of the bond, nor a condition precedent to the party's title to the office. The time not being of the essence of the thing required to be done here, it was not material.- Rex v. Lexdule, 1 Burr. 497; Sedgw. State. & Const. Law, 368-74. When a sheriff was required to give bond within twenty days after his election, it has been held that the statute as to the time of giving the bond was directory merely, and that the failure to give the bond within that time did not forfeit his title to the office - People v. Holly, 12 Wend. 481. * * *"

What effect then would be given to Section 57.020 and 57.040 considered together? In this regard we have been unable to find any Missouri case passing directly upon this point and an examination of persuasive authority from other jurisdictions reveals a diversion of opinions, with, however, a tendency toward a directory interpretation. Such is indicated by the following found in 42 Am. Jur., Public Officers, Section 124, page 970:

> "* * *It may be said, however, that official bonds are intended for the benefit of the public, and that requirements of the law as to the time of filing them should not be taken as mandatory unless clearly so. In

> numerous cases they have been construed as directory merely. A statute has been held directory merely which provided that an office shall become vacant on failure to furnish a bond within a specified time, or that upon such failure the person chosen for the office shall be deemed to have refused it. * * *"

See also Mechum on Public Officers where the rule is stated as follows:

> "* * *These provisions as to time, however, though often couched in most explicit language are usually construed to be directory only and not mandatory.
>
> * * * * * * * * * * * * * * * * *
>
> "A fortiori is this so, when the failure was through no fault of the officer.
>
> "Even though the statute expressly provide that upon a failure to give the bond within the time prescribed, the office shall be deemed vacant and may be filled by appointment, it is generally held that the default is a ground for forfeiture only and not a forfeiture ipso facto. * * *."
>
> (Mechum, Public Officers, Chap. VII, Secs. 265, 266, page 166.)

In the case of State ex rel. Lysons v. Ruff, 16 L.R.A. 140, the Supreme Court of Washington considered a similar question under statutes substantially the same as the two sections here in question and reasoned as follows:

> "In determining the force of these statutes, this well-settled rule must be borne in mind, that forfeitures are abhorred by the courts, and that, when it is reasonably possible so to construe the law as to avoid a forfeiture, such construction will be adopted. If, as we have seen,the first section above quoted is clearly declaratory when standing alone, the last section above quoted might be held to have been enacted in view of such construction of said first section,

> and the Legislature to have intended in said last section by the words 'within the time fixed by law' not within fifteen days, as named therein, but within the time which the court would hold to be covered by said section when construed as declaratory, and not mandatory. With such a construction of section 3063 all difficulty would be done away with, and there would be nothing in it to change the rule of construction which would otherwise obtain as to said section 2708. Said section 3063 is found within the chapter relating to the filling of vacancies, and provides what facts shall be sufficient to authorize the proper authority to exercise its powers in that regard. But it does not follow that the person elected has lost all right by reason of his failure to qualify. The object of such provision will be fully accomplished by holding that such failure to qualify does not in itself work a forfeiture of the right to the office, but simply authorizes the proper authority to declare such forfeiture, and fill the office by appointment. By the construction force would be given to every word in said section 3063, and the usual construction preserved as to the other section in question. Thus construed, the proper authority would at any time after the expiration of the fifteen days prescribed by the statute have the power to declare a vacancy, and at once fill the same by appointment, and, this having been done, the right of the person elected to the office would be determined and ended; but until such action was taken the person elected could, by qualifying within any reasonable time after notice of his election, make perfect his title."

Under the above cited authority and referred rules of construction, we are of the opinion that the Appellate Courts of this State would be prone to interpret the statutes considered as being simply directory and that the same would not create a vacancy ipso facto, although non-compliance with said sections might give cause to a proper authority to declare said office vacant under a proper proceeding. Such is at least, impliedly indicated in the case of State ex rel. Jackson v. Howard Co. Ct., 41 Mo. 247, where the court, by way of dictum, said:

> "It is very probable that if the petitioner had duly received his certificate of election, and had then wholly failed to present any bonds at all, whereby the office might have become practically vacant, the court might have the jurisdiction to declare it vacant and appoint another; * * *."

Honorable James L. Paul

CONCLUSION

Therefore, it is the opinion of this office that Sections 57.020 and 57.040, RSMo 1949, requiring a sheriff elect to give bond within fifteen days after receipt of his certificate of election, and declaring that said office shall become vacant on failure of said sheriff to give bond within the time required, would be construed as simply declaratory rather than self-executing, although non-compliance might be cause for a proper authority in an appropriate proceeding to declare said office vacant.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DDG:hr

ELECTIONS: Person may vote for single candidate for congressman or city councilman if he desires, even though more than one office is to be filled from candidates for congressmen or city councilmen.

May 20, 1952

5-21-52

Mr. James M. Peery
Financial Secretary
Boot and Shoe Workers' Union
No. 521
608 Franklin Street
Moberly, Missouri

FILED
70

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

> "In the next election if congressmen have to run at large the same question will come up. If we did not vote for eleven congressmen and voted for one could our ballot be thrown out by the election judges and not counted.
>
> "In a recent city election under the City Manager Form of Government two councilmen were to be elected. There were three candidates for councilmen which were as follows: Earl B. Noel, Allen C. White, James E. Burton.
>
> "Some of the members wanted to know if they could vote for one councilman only for example James E. Burton and scratch the other two."

The question of whether or not a person can vote for a single candidate for an office to which more than one person is to be elected at a single election is answered,

we believe, by the case of Riefle v. Kamp et al., 247 S.W. 2d 333, where the court was passing on an election for the office of city councilman of Wellston, Missouri. The court said l.c. 335:

> "This is an election contest for the office of City Councilman for the Second Ward of the City of Wellston, Missouri, growing out of an election held in said city on April 4, 1950. This was the first election to be held in said city and two councilmen were to be elected from the second ward, the candidate receiving the highest number of votes being elected for a two year term and the candidate receiving the next highest being elected for a one year term." (Emphasis ours.)

The court further said l.c. 336:

> "Ballot No. 10 is challenged by contestee because of the manner in which it is marked. In the space provided for the names of candidates for councilman the voter made marks in only one square, the one before the name of contestant." (Emphasis ours.)

Ballot No. 10 was held to be valid by the court at l.c. 337, where the court said:

> "The logical conclusion is that the voter was retracing the cross marks in these two instances in order that it might be more clearly seen. It may have been because of his poor eyesight or bad lighting conditions in the voting booth. This did not spoil the ballot and it should be counted as a vote for contestant."

The court said regarding ballot No. 5, l.c. 337:

> "Objection is made to ballots numbered 3, 5, 7 and 8 because of the marking

> used by the voter. On each ballot the voter used in the square before the voter's name a mark commonly referred to as a check mark. This might be described as a form of and resembling the letter V. On ballot No. 3 this mark is placed in the square before the name of contestee and in the square before the name of William Kamp. On ballot No. 5 it appears before the name of contestant only. On ballot No. 7 it appears before the names of contestee and Mrs. Harry Perkins. On ballot No. 8 it appears before the names of contestee and Mrs. Harry Perkins. On each ballot the mark is placed in the square before the name of one candidate for each of the other offices appearing on the ticket. From this it will be observed that if these ballots are counted contestant will receive one vote and contestee three votes." (Emphasis ours.)

Such ballot was held to be valid by the court, which said, l.c. 340:

> "We conclude that where two reasonably straight lines meet within the voting space at an angle of less than ninety degrees, forming a solid juncture so that the end of one line also forms the end of the other line, the voter has substantially complied with the statute and the vote should be counted, unless objectionable for other reasons. Each of the questioned ballots in this case meets this test and should be counted." (Emphasis ours.)

Although such ballots were not challenged on the specific ground that more than one person should have been voted for at such election, the fact that the court held the ballots which disclosed a vote for only one candidate to be valid is

a finding by the court that such ballot was valid in all respects. The reasoning in this case, we believe, is equally applicable to an election for congressmen at large. We therefore hold that a person may cast a valid ballot for a single candidate for an office at which more than one candidate is to be elected.

CONCLUSION

It is the opinion of this department that where more than one councilman is to be elected and where more than one congressman is to be elected, and voters may vote for several of such councilmen or congressmen, that a voter may legally vote for a single candidate for councilman or congressman if he so desires.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General of Missouri

CBB:lrt

STATE PHARMACY BOARD:
PHARMACY PERMITS(annual)
DUE WHEN:
USE OF FEES:
INSPECTORS, SALARIES AND EXPENSES:

Annual fee for permit due October 1, 1952, permit expires June 30, 1953. Proprietor of wholesale drug business must be licensed pharmacist or have at least one in his employ. Permit fees can be used if appropriated to Board's use by General Assembly. Inspectors could be hired after August 1, 1952, on 1951-1953 appropriation if there are sufficient funds in it.

FILED
70

September 30, 1952

10-6-52

Missouri State Board of Pharmacy
Charles W. Riley, Secretary
Springfield, Missouri

Gentlemen:

Your recent request for an opinion of this department has been assigned to me for answer. Said request reads as follows:

> "(1) House Bill #184, Section 1. provides for a $10.00 annual fee, payment issued for one year only. Part 1 under Section 3. states that permits expire June 30th following date of issue, at which time renewals are due for the ensuing year. Would it be legal or would the Board have a legal right to collect a one-half fee of $5.00 for a period of six months dating from January 1, 1953, to June 30, 1953, at which time an annual renewal would be due? This procedure would set us straight as our Board operates under a fiscal year.
>
> "(2) House Bill #185, Section #338.010, deals in part with persons operating wholesale drug businesses. Is not a firm operating as a wholesale drug or pharmaceutical company required to have in its employ at least one person who is licensed as a pharmacist?
>
> "(3) If collections from the permits can be started as of January 1, 1953, when can this money be appropriated to the Pharmacy Board for use in hiring inspectors as provided for in House Bill #185, Section #338.150, and for the over-all enforcement of the law?"

Paragraph (1) of your request, we are of the opinion, is answered by the first three sentences of Section 1 of House Bill No. 184 of the 66th General Assembly, which reads as follows:

"Section 1. On and after sixty days from and after the taking effect of this act, it shall be unlawful for any person, copartnership, association or corporation to open, establish, operate or maintain any pharmacy, as defined by statute, within the state of Missouri, without first obtaining a permit to do so from the Missouri board of pharmacy. Application for such permit shall be made upon a form to be prescribed and furnished by said board; such application shall be accompanied by a fee of ten dollars. The permit issued shall be for one year only, but may be renewable annually upon payment of a like fee. * * *" (Underscoring ours.)

A study of the underscored part of the above set out "Act" brings us to the conclusion that a permit of the Missouri Board of Pharmacy is to be obtained by any pharmacy operating in this state by October 1, 1952, which is sixty days after this "Act" became effective (August 1, 1952). That applications shall be made to the Board, upon suitable forms issued by the Board and said application shall be returned accompanied by the fee of $10.00. That upon receipt of said application and fee by the Board it shall issue a permit carrying the expiration date of June 30, 1953, on the first series of permits issued under this "Act" and dated each year thereafter from July 1 of the year of issuance and expiring of June 30 of the following year.

The dates for the period for which the aforesaid licenses are to be issued is controlled by Section 3 of House Bill No. 184, supra, which reads as follows:

"Section 3. 1. The permit, or renewal thereof, issued under the provisions of this act, and under which a pharmacy is being operated, shall be posted and exposed in a conspicuous place in such pharmacy, and the same shall expire on the last day of June following the date of issue; such permit or renewal of permit shall not be transferable.

"2. Application blanks for renewal permits shall be mailed by the Missouri board of pharmacy to each permittee on or before the first day of June in each year, and if application for renewal of permit is not made before the first day of July following, the existing permit, or renewal thereof, shall lapse and become null and void upon the thirty-first day of that month.

"3. All fees collected under the provisions of this act shall be deposited in the state treasury to the credit of the Missouri Board of Pharmacy Fund, to be used by the Missouri Board of Pharmacy in the enforcement of the provisions of this act, when appropriated for that purpose by the General Assembly." (Underscoring ours.)

With regard to paragraph (2) of your request, Section 338.010 of House Bill No. 185 of the 66th General Assembly, effective August 1, 1952, reads as follows:

"338.010. It shall be unlawful for any person not licensed as a pharmacist within the meaning of this chapter to compound, dispense or sell at retail any drug, chemical, poison or pharmaceutical preparation upon the prescription of a physician, or otherwise, or to compound physicians' prescriptions, except as an aid to or under the direct supervision of a person licensed as a pharmacist under this chapter. And it shall be unlawful for any owner or manager of a pharmacy or drug store, or other place of business, to cause or permit any other than a person licensed as a pharmacist to compound, dispense or sell at retail, any drug, medicine or poison, except as an aid to or under the direct supervision of a person licensed as a pharmacist; provided, however, that nothing in this section shall be construed to interfere with any legally registered practitioner of medicine or dentistry in the compounding or dispensing of his own prescriptions, nor with the exclusively wholesale business of any dealer who shall be licensed as a pharmacist or who shallkeep in his employ at least one person who is licensed as a pharmacist, nor with the sale of poisonous substances which are sold exclusively for use in the arts or for use as insecticides, when such substances are sold in unbroken packages bearing a label having plainly printed upon it the name of the contents, the word poison and the names of at least two readily obtainable antidotes; provided, however, that nothing in this section shall be so construed as to apply to the sale of patent and proprietary medicines, and the ordinary household remedies and such drugs or medicines as are normally sold by those engaged in the sale of general merchandise; provided further, that nothing in this section shall be so construed as to prevent any person, firm or corporation from owning a pharmacy, drug or chemical store or apothecary shop, providing such pharmacy, drug or chemical store

> or apothecary shop shallbe in charge of a licensed pharmacist." (Underscoring ours.)

From the above underscored part of the statute we are of the opinion that the owner of a wholesale drug or pharmaceutical company must be a licensed pharmacist or must have at least one licensed pharmacist in his employ to comply with the statute.

In answering paragraph (3) of your request we believe we have answered the part dealing with collections for permits in the first part of this opinion. However, going on to the question of when the fees collected from the issuance of permits, under Section 1 of House Bill No. 184, supra, can be appropriated by the General Assembly to the use of the Missouri Board of Pharmacy, as provided by Section 338.150 of House Bill No. 185 for the hiring of inspectors and overall enforcement of the law, we are of the opinion that these funds deposited to the Missouri Board of Pharmacy Fund are available for the Board's use to the extent of the 1951-1953 biennium appropriation for the Board of Pharmacy.

Section 338.150, supra, reads as follows:

> "338.150. The board of pharmacy may appoint one or more assistant secretaries or inspectors not to exceed three, who shall be registered pharmacists, and who shall receive such salary as may be prescribed by the board of pharmacy, not to exceed three hundred dollars per month, and necessary traveling expenses while engaged in the performance of official duties, payable monthly. Such assistant secretaries or inspectors and any member of the board of pharmacy are hereby given the right of entry and inspection upon all open premises purporting or appearing to be a drug or chemical store, apothecary shop or place of business for the retailing, exposing for sale at retail, or the dispensing or selling of drugs, medicines, chemicals, or poisons or for the compounding of physicians' prescriptions. Such assistant secretaries or inspectors shall assist the secretary of the board of pharmacy and perform such duties as the board may direct. Such assistant secretaries or inspectors shall be subject to removal at the pleasure of the board of pharmacy."

The three inspectors or assistant secretaries provided for in Section 338.150 of House Bill No. 185, supra, can be hired by your Board now, or could have been hired by it at any time after August 1, 1952, the effective date of this statute. They can also be paid salaries not to exceed $300.00 per month if that sum is available from your Board's 1951-1953 appropriation for Personal Service. Also

their necessary traveling expenses may be paid by the Board if the money is available to be used from the State Board of Pharmacy's 1951-1953 appropriation for General Expense. Our reason for so holding regarding salaries and expenses is that the Missouri Appropriations Laws, 1951-1953, read as follows:

> "Section 7.420. State Board of Pharmacy.-- There is hereby appropriated out of the State Treasury, chargeable to the Board of Pharmacy Fund, the sum of Twenty-seven Thousand Dollars ($27,000.00), for the use of the State Board of Pharmacy, for the payment of salaries, wages and per diem of the officers, members and employees; for the original purchase of property; for the repair and replacement of property; and for the general operating and other expenses; for the biennial period beginning July 1, 1951 and ending June 30, 1953, as follows:
>
> "Personal Service:
>
> "Salaries, wages and per diem of the Board members necessary employees and Federal Old-Age and Survivors Insurance $14,000.00
>
> "Additions, repairs and Replacements and Operation:
>
> "For the original purchase, repair and replacement of office furniture and equipment, material and supplies.
>
> "General expense: including communication, printing binding, transportation, travel, within the state, insurance and premiums on bonds, other general expense including stationery and office supplies, office rent, light, heat, water and power supplies and Federal Old-Age and Survivors Insurance. Total Additions, Repairs and Replacements and Operation $13,000.00
>
> "Total from State Board of Pharmacy Fund $27,000.00"
>
> (Underscoring ours.)

From a reading of the above 1951-1953 appropriation it will be seen that $27,000 has been appropriated out of the Board of Pharmacy Fund. All monies received in said fund from the licenses provided

for in House Bill No. 184 are available if needed to provide the money so appropriated, which is the sum of $27,000.

The primary rule of statutory construction is to ascertain and give effect to the lawmaker's intent. Nordberg v. Montgomery, 351 Mo. 180, 173 S.W.(2d) 387; Wallace v. Woods, 340 Mo. 452, 102 S.W.(2d) 91. This, we believe, has been done in the present instance.

CONCLUSION

It is therefore, the opinion of this department that:

1. The annual fee of $10.00, provided by law, for a permit to operate a pharmacy, as defined by law in House Bill No. 184 of the 66th General Assembly, is due October 1, 1952, and said permit shall be for one year and be dated so as to expire on June 30, 1953.

2. Under House Bill No. 185, Section 338.010, supra, it is mandatory that the proprietor of a wholesale drug business be a licensed pharmacist or have at least one licensed pharmacist in his or its employ.

3. Collections from permits deposited to the Board of Pharmacy Fund can be used to pay inspectors' salaries or for the purpose of overall enforcement of the "Pharmacy Law" if the Board of Pharmacy has sufficient money in its 1951-1953 appropriation to pay the salaries out of the part allotted for Personal Service and the expenses out of that part allotted for General Expense.

Respectfully submitted,

A. BERTRAM ELAM
Assistant Attorney General

APPROVED:

OK

J. E. TAYLOR
Attorney General

ABE:mw

ELECTIONS: Printing official ballot on supplement to a newspaper, which is contained in the newspaper and distributed to all subscribers, constitutes sufficient publication of the official ballot.

PUBLICATIONS:

NEWSPAPERS:

FILED
70

December 9, 1952

12-11-52

Honorable John P. Peters
Prosecuting Attorney
Osage County
Linn, Missouri

Dear Sir:

This will acknowledge receipt of your letter, with enclosures, requesting an opinion of this department, which, in part, reads:

> "I write to inquire if my enclosed 'Exhibit B' is a legal Publication of the Official Ballot, here in a local newspaper and to better understand my proposition submitted, I also enclose 'Exhibit A', the difference being that Exhibit 'A', is manifestly a part of the general makeup of the paper, while 'B' is only designated as a 'Supplement' to the paper, and is and has been folded in the Paper, publishing it, and in that form delivered to the subscribers. My concern is, that the papers publishing or distributing both 'A' and 'B' will present sizeable bills to the County Court, for payment, 'For publishing the Official Ballot.' An early opinion will be highly appreciated."

You have inquired whether or not enclosed Exhibit B is a legal publication of the list of nominations as required by law.

Section 120.580, RSMo 1949, imposes the duty upon the clerk of the county court to publish the list of nominations to public office prior to the holding of an election, and reads as follows:

> "At least seven days before an election to fill any public office, the clerk of the county court of each county shall

> cause to be published in two newspapers representing each of the two major political parties, if such there be, and if not, then in two newspapers, or if there be only one newspaper published within the county then in such newspaper, the nominations to office certified to him by the secretary of state and also those filed in his office. He shall make two such publications in each of such newspapers before the election, one of which publications in each newspaper shall be upon the last day upon which such newspaper is issued before the election; provided, that no higher rates shall be paid per inch, than is provided by section 493.030, RSMo 1949." (Emphasis ours.)

Section 120.590, RSMo 1949, provides for the arrangement or form in which the list of nominations shall be published, and, in part, reads:

> "The list of nominations published by the clerks of the county courts of the respective counties shall be arranged in the order and form in which they will be printed upon the ballot, the size of type, squares and emblems used, spacing and blank lines to be as prescribed by law for the official ballot; * * *"

The above statute, in effect, provides for the publishing of a form of the official ballot to be used in the election.

In reading your letter there appears to be no question or objection regarding the form or arrangement of the official ballot as printed. Rather, you have inquired whether or not the ballot as printed constitutes a publication within the meaning of the statutes.

It is noted at the top of the page or paper on which the official ballot is printed that it is designated as a "Supplement to Osage County Republican, Linn, Missouri," and dated Thursday, October 23, 1952. Immediately there following, in large type, are the words "County Clerk's Notice of General Election." Then following is a printing of the form of official ballot with instructions to voters.

You have stated that Exhibit B, as above described, was folded and inserted in the newspaper and that the newspaper with the folded supplement contained therein was delivered to the subscribers. From this we assume that Exhibit B or the supplement was delivered to all of the subscribers of the newspaper.

With regard to the meaning of the terms "publish" and "publication," the following is said in Estill County v. Noland, 295 Ky. 753, 175 S.W. (2d) 341, 346:

> " * * * The thought running through all the uses of the words 'publish' and 'publication' in such connections is an advising of the public or the making known of something to the public for a purpose and the act is deemed sufficient if it gives notice to the public of any matter desired to be brought to its attention. * * *"

Again in the case of National Geographic Soc. v. Classified Geographic, 27 F. Supp. 655, 659, the Federal District Court of Massachusetts said:

> "'In its ordinary acceptation, the word "publication" means "the act of publishing a thing or making it public; offering to public notice; or rendering it accessible to public scrutiny." * * *'"

Applying the above definitions to the situation which you have presented it would seem that by enclosing Exhibit B in all of the newspapers delivered to the subscribers it would be making known to the subscribers of the public matter desired to be brought to their attention, and would be offering to public notice the form of official ballot and rendering it accessible to public scrutiny.

Exhibit B has been designated as a "supplement" to the newspaper undertaking to publish the form of official ballot. The term "supplement" has been held to mean that which completes or makes an addition to something already organized, arranged or set apart. State v. Wyandot County, 16 Ohio Cir. Ct. Rep. 218. Applying this definition it would appear that Exhibit B was an addition to the organized and arranged issue of the Osage County Republican which was published and distributed Thursday, October 23, 1952.

Honorable John P. Peters

In the case of Star Company v. Colver Publishing House, 141 F. 129, the Federal Circuit Court of Appeals held that a supplement to a newspaper is an addition to the usual issue of the newspaper.

Therefore, applying the above definitions to the situation which you have presented it would seem that Exhibit B, designated as a supplement to the newspaper in question, was an addition to the issue of the newspaper published and distributed on October 23, 1952, and was included in all copies of the newspaper distributed on that date, which we believe would be sufficient to convey notice to the public and subscribers of the newspaper of the matter desired to be brought to their attention, and that such would constitute a publication in the newspaper sufficient to comply with the requirements of the statutes.

CONCLUSION

In the premises, it is the opinion of this department that the printing of the form of official ballot to be used in a general election in a supplement to the newspaper printing said form of ballot, and where the particular issue of the newspaper with the supplement contained therein is distributed to all of the subscribers, is sufficient to comply with the statutes requiring a publication of the official ballot.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:ml

PRIVATE CORPORATIONS:
PRIVATE BENEVOLENT ASSOCIATIONS:
COUNTY COURT:
PUBLIC MONEY, CONTRIBUTIONS OR GIFTS:

No county, city or other political subdivision of the State of Missouri can contribute or give any public funds to the "Executive Committee of the Greater Jefferson City Committee, Inc." as the same is a private corporation.

February 29, 1952 3/3 h-2

FILED
75

Honorable James T. Riley
Prosecuting Attorney
Cole County
Jefferson City, Missouri

Dear Sir:

Your opinion request of February 15, 1952, has been referred to me for reply. Your request is as follows:

> "At this time a non-profit corporation has been formed under Chapter 352, R.S. Mo. 1949, under the name of 'The Executive Committee Of The Greater Jefferson City Committee, Inc.'
>
> "The purpose of this corporation is as follows: 'This association is formed for the purpose of promoting the orderly growth and welfare of the City of Jefferson, Missouri, and to that end, to enter into Contracts with City Planning Engineers and others, to solicit and secure pledges of money from various governmental and other and private agencies to defray the costs of the project for which this association is formed; to receive money for said purpose, and to expend the same.'
>
> "I understand that the 'City Planning Engineers' referred to above, are private engineers and are not engineers in the regular employment of the city.
>
> "This group has now asked the Cole County Court to make a contribution to the private corporation to be used for the purposes above named. I will appreciate it if you will advise me whether or not the Cole County Court can lawfully appropriate the public funds of Cole County for a contribution to this corporation."

From your request we conclude that "The Executive Committee of The Greater Jefferson City Committee, Inc." is purely a private corporation although its apparent purpose is for the betterment and orderly growth of Jefferson City, Missouri. The 1945 Constitution of Missouri, Article VI, Section 23, reads as follows:

> "Sec. 23. Limitation on Ownership of Corporate Stock, Use of Credit and Grants of Public Funds by Local Governments.--No County, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this Constitution."

We feel that this section of itself precludes any political subdivision of this state from contributing or donating any public funds to any type private corporation, but then we also have Article VI, Sec. 25, which reads as follows:

> "Sec. 25. Limitation on Use of Credit and Grant of Public Funds by Local Governments--Exceptions--Pensions for Police and Firemen, and Other Employees of Certain Cities--Benefit Funds for Educational Employees.--No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation except that the general assembly may authorize any municipality to provide for the pensioning of the salaried members of its organized police force or fire department and the widows and minor children of the deceased members, and may authorize any city of more than 100,000 inhabitants to provide for the pensioning of other employees, and may also authorize payments from any public funds into a fund or funds for paying benefits upon retirement, disability or death to persons employed and paid out of any public fund for educational services, and to their beneficiaries or estates."

A reading of the sections of this provision (Art. VI) only further convinces us that no political subdivision of this state or political corporation or subdivision can grant money or property to the above corporation which, as we have said before, is, to our mind, merely a private corporation. If this were not so what would prevent a city, county, state or other political subdivision from

Hon. James T. Riley

contributing to a Chamber of Commerce which is a corporate body incorporated for civic betterment also.

CONCLUSION

It is, therefore the opinion of this office that no county, of the State of Missouri can contribute or give any public funds to the "Executive Committee of the Greater Jefferson City Committee, Inc." as the same is a private corporation.

Respectfully submitted,

A. BERTRAM ELAM
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ABE:mw

HEALTH:
HOSPITALS:
COUNTY COURT:

The dissolution of a county public health center can only be accomplished as provided by statute. County court without authority to reduce tax rate voted for county public health center.

October 7, 1952

FILED
76

Honorable Lawson Romjue
Prosecuting Attorney
Macon County
Macon, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this department, which reads:

> "The County Court of Macon County has directed me to request your opinion under the provisions of Sections 205.010--205.130, Revised Statutes of Missouri, 1949, inclusive, as amended by Re-enacted Laws of 1951, H. B. 307, upon the questions hereinafter set out.
>
> "The pertinent facts are that at an election a few years ago when the original act was in effect the people of this County voted to establish a Health Center and same has been in operation. A one mill tax has been levied but no bonds have been issued. The excess money obtained by the levy of the one mill tax has been held and a good part of it invested in United States Bonds for the benefit of the Health Center. There now appears to be a considerable feeling among the people of the County that the Health Center should not be continued.
>
> "Questions: 1. May the Health Center be abolished by the people of the County. 2. If the answer to the preceding question is

> in the affirmative, what method may be employed. 3. May the County Court reduce the tax below one mill per $100 valuation if the operation of the Health Center is continued."

The original act providing for the establishment of county health centers is contained in Sections 205.010 through 205.130, RSMo 1949. Several of those sections have since been repealed or amended by the Laws of 1951.

In the original act, under which your county health center was established, Section 205.010 provided for the manner in which a health center was to be established, and reads as follows:

> "Any county or group of counties, subject to provisions of the Constitution of the state of Missouri, may establish, maintain and manage and operate a public county health center in the following manner: Whenever the county court or courts shall be presented with a petition signed by ten per cent or more of the qualified voters in the county or counties affected as determined by the number of votes cast for governor at the preceding general election, asking that an annual tax be levied for the establishment, building, maintaining of a public health center and the maintenance of such personnel as may be needed for the operation of such center and shall specify in their petition, the maximum amount of money proposed for said purposes, such county court or courts shall submit the question to the qualified voters of the county or counties at the next general election to be held in the county or counties or at a special election called for that purpose, first giving ninety days' notice thereof in one or more newspapers published in the county or counties, if any be so published, and if not so published, by posting written or printed notices in each township of the county or counties, which notice shall include the text of the petition and state the amount of the tax to be levied upon the assessed

> property of said county or counties, which tax shall not exceed one mill on the dollar, for a period of time not exceeding twenty years, and be for the issue of county bonds to provide funds for the purchase of a site or sites, the erection thereon of a public health center and for the support of the same including necessary personnel; which said election shall be held at the usual voting places in the county or counties for voting upon county officers, and shall be canvassed in the same manner as the vote for county officers is canvassed."

The above section has been amended by the Laws of 1951. However, the same procedure for establishing a county health center and the levying of a tax is generally followed in the amended law.

It will thus be seen that under the above-quoted statute, in both its original and amended form, the county public health center is a creature of the Legislature and comes into existence in the manner provided by legislative enactment.

We believe that in this regard it can be compared to a municipal corporation whose existence is also dependent upon laws enacted by the Legislature.

A study of all of the sections relating to county public health centers shows that there is no statutory provision providing for the dissolution of a public health center once it has been established in the manner provided by law, and specifically we find no statutory procedure which would permit the people of the county or the county court to follow for the purpose of dissolving a county health center.

Looking to the law relating to the dissolution of municipal corporations, the Supreme Court of Missouri, in the case of In re City of Kinloch, 242 S.W. (2d) 59, said the following at l.c. 62:

> " * * * A municipal corporation when once incorporated can only become disincorporated by resorting to the proceedings pointed out by statute. * * *"

Again in the case of State ex rel. and to Use of Behrens v. Crismon, 188 S.W. (2d) 937, 354 Mo. 174, the Supreme Court, at S.W. l.c. 939, said:

> "We think respondents' contentions overlook certain fundamental principles of the law relating to the municipal corporations. 'The power to create or establish municipal corporations, or to enlarge or diminish their area, to reorganize their governments, or to dissolve or abolish them altogether is a political function which rests solely in the legislative branch of the government, and in the absence of constitutional restrictions, the power is practically unlimited.' * * *
>
> * * * * * * *
>
> " * * * In short, unless otherwise specially provided by the legislature, the nature and constitution of our municipal corporations, as well as the purposes they are created to subserve, are such that they can, in the author's judgment, only be dissolved by the legislature, or pursuant to legislative enactment. They may become inert or dormant, or their functions may be suspended, for want of officers or of inhabitants; but dissolved, when created by an act of the legislature, and once in existence, they cannot be, by reason of any default or abuse of the powers conferred, either on the part of the officers or inhabitants of the incorporated place. As they can exist only by legislative sanction, so they cannot be dissolved or cease to exist except by legislative consent or pursuant to legislative provision.'" (Emphasis in first paragraph ours.)

In view of the above authorities it is our thought that county public health centers, whose creations are provided for by legislative enactment, once in existence can only be dissolved by an act of the Legislature providing for their dissolution or providing for the procedure by which they may be dissolved. As previously stated, there is presently no statutory provision providing for the manner in which a county public health center may be dissolved.

In view of the foregoing your first question is answered in the negative.

Proceeding to your second question, at the time the health center in your county was formed Section 205.010, RSMo 1949, as originally enacted, was in effect. Under the provisions of that statute when the election was had to organize a health center the tax was also voted to provide for its maintenance and operation.

Under the old section the tax which was voted should have been for a period of time not exceeding twenty years. In other words, when the tax was voted the amount so voted was to be levied and collected without change for a specific period of time.

Under Section 205.010, as amended, the time limitation is omitted, and it is provided that the "notices shall include the text of the petition and state the rate of tax to be levied annually thereafter upon the assessed property of the county." Therefore, under the new section the tax rate voted would be one to be levied "annually thereafter."

Under the original Section 205.010, or that section as amended, it would seem that the tax rate voted would have to remain constant and not subject to change. Furthermore, upon looking at the other statutes pertaining to county public health centers, nowhere does it appear that the county court is given authority to reduce the tax rate below that originally voted.

Consequently, your third question is answered in the negative.

CONCLUSION

Therefore, it is the opinion of this department that county public health centers can only be dissolved by an act of the Legislature providing for their dissolution or providing for the procedure by which they may be dissolved, and that they cannot presently be abolished by the people of the county in the absence of a statutory provision permitting it.

It is also the opinion of this department that the county court is without authority to reduce the tax rate originally voted and to be levied for the maintenance and operation of a public health center.

Respectfully submitted,

APPROVED:

RICHARD F. THOMPSON
Assistant Attorney General

J. E. TAYLOR
Attorney General

BOND ELECTIONS; Form of ballot. County bond elections. : The form of the constitutional ballot may not be used in submitting a county bond issue to the voters. The proposition should be placed on a separate ballot, printed and in the form prescribed in Section 108.060, RSMo 1949.

FILED 17

October 17, 1952

10/24/52

Honorable John P. Ryan
Assistant County Counselor
Jackson County
Kansas City, Missouri

Dear Mr. Ryan:

This will be the opinion you recently requested from this office whether a proposed county bond issue proposition of Jackson County, Missouri, should be placed on the constitutional ballot, and whether, in that behalf, Section 125.050, RSMo 1949, providing for the placing of every other proposition submitted to voters at the General Election, other than constitutional amendments, on the form of the constitutional ballot, nullifies or supersedes Section 108.060, RSMo 1949, which section prescribes a separate and specific form of the ballot and the manner in which it is to be printed for the submission of a county bond proposition to the electorate. Your letter requesting the opinion, reads as follows:

> "Jackson County has five propositions to issue the bonds of Jackson County in the total sum of $2,325,000.00. The City of Kansas City, Missouri has several propositions for amending the charter of said city and also has one bond proposition.
>
> "The Election Commissioners this morning took the position that the county bond propositions must be placed on the constitutional ballot with the city amendments and the city bond issue.
>
> "We take the position that Section 108.060 R.S. Mo. 1949 has provided a specific method for the form of the ballot and the manner in which it is to be printed and that the Election Commissioners have nothing to do with them except as to distribution and counting of same. The proposition of the city both as to amendments and bonds provide for a

Honorable John P. Ryan:

'For' and 'Against' answer and provide that the boxes are to be placed to the left of the propositions. The propositions of the county as set out in Section 108.060 provide for a 'Yes' and 'No' answer and also that the boxes be placed to the right of the ballot. To place these conflicting and contrasting proposals on the same ballot would be confusing to the voter.

"Will your office give us an opinion on these three questions:

"1. Does Section 125.050 nullify or supersede Section 108.060 R.S. Mo. 1949?

"2. Must the county bond propositions be placed on the constitutional ballot?

"3. If you hold that all of these propositions have to be on one ballot, do the county bond propositions take precedence in numerical position over the city amendments and the city bond issue, having in mind that the city has submitted to the Election Commissioners their proposed charter amendments and proposed bond issue prior to that of the county?

"Because of the immediate necessity of preparing these ballots for the ensuing election, I would appreciate your answering these questions as soon as possible. I would also like to have you send a copy of your opinion to the Board of Election Commissioners of Kansas City, Missouri, Jackson County Court House, Kansas City, Missouri."

It is apparent that, since the Election Commissioners take the position, as recited in your letter, that the county bond proposition must be placed on the constitutional ballot with the city amendments and city bond issue, and since your letter submits the direct question whether Section 125.050,

Honorable John P. Ryan:

RSMo 1949 nullifies or supersedes Section 108.060, RSMo 1949, the position taken by the Election Commissioners is based upon the sentence in said Section 125.050 which, after providing for the form of the constitutional ballot and its use in submitting constitutional amendments, states the following:

> "* ** Every other proposition, including referendum and initiative measures, to be submitted at the general election shall be proposed and submitted on the 'Constitutional Ballot,' as herein provided, if any proposed constitutional amendments are submitted at such election or not. * * * ."

The immediate question to be resolved here is, whether said Section 125.050 in providing that every other proposition submitted at the General Election shall be proposed and submitted on the constitutional ballot nullifies or supersedes Section 108.060, RSMo 1949, which provides a definite and particular method for the submission of a county bond issue to the voters of the county and which provides that, in the submission of such bond issue the County Court shall prepare and have printed the following form of ballot which shall be used, to-wit:

> "OFFICIAL BALLOT
>
> "Instructions to voters:
>
> "To cast a ballot in favor of the proposition submitted upon this ballot place a cross (X) mark in the square opposite the word 'Yes'; to vote against the proposition submitted upon this ballot place a cross (X) mark in the square opposite the word 'No.'
>
> "Shall the following be adopted:
>
> "Proposition to issue the bonds of..... YES ☐
> (Insert name).....county to the amount
> of $....for the purpose of.....(Insert purpose) NO ☐"

The Supreme Court of Missouri had before it for construction this identical sentence as it appeared in Section 4944, R.S. Mo. 1919. The Court ruled upon its meaning and effect, with respect to other independent statutes which provide specific procedure for submitting other and different propositions to the

people at the General Election, in the case of State ex inf. Barrett, Attorney General vs. Robert Imhoff, et al., 291 Mo. 603, 238 S.W. 122. Our citations here will refer to 291 Mo. 603. That case was an application for a writ of quo warranto brought in the Supreme Court to oust from office certain township officers of Wright County, Missouri. An election had been held in Wright County, Missouri, on the question submitted of adoption of township organization in that county. The Attorney General questioned the validity of the election in his petition for a writ upon two grounds. One, that the order of the County Court submitting the question to the people was insufficient in failing to show that a petition signed by more than one hundred voters of Wright County had been filed with the County Court and that, therefore, the order of the County Court in calling the election for the submission of the proposition was invalid.

The second objection to the validity of the proceedings and said election raised by the Attorney General was that the question was not submitted on the constitutional ballot as provided by Section 4944, R.S. Mo. 1919, but was printed at the bottom of the ticket containing the names of candidates for various offices to be voted for at said election. The Court took jurisdiction in the proceeding and held that the petition and the order of the County Court ordering the election were sufficient. We are not here directly concerned with that question, but refer to it in passing, only to say that the Court held the petition, the order of the county court and the election thereunder, valid.

The Court then considered the question raised by the Attorney General as to the manner of the submission to the voters of the county of the adoption or rejection of township organization. The Court recited in its opinion that a statute enacted with special reference to that subject and which had been in force since its enactment in 1879 (Laws of Missouri, 1879, page 218), and which was in force at the time of the calling and holding of said election in Wright County, was Section 13165, R.S. Mo. 1919, and which authorized any County Court, on petition of one hundred legal voters of said county, to cause to be submitted to the voters of the county the question of township organization, by the ballot, to be written or printed "'For township organization'" or "'Against township organization'", to be canvassed and returned in like manner as votes for state and county offices. It was under this statute, the Court states, that the question of township organization was submitted and that the officers sought to be ousted were elected.

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The relator contended that Section 4944, having been enacted subsequently to Section 13165, repealed the latter section and that, therefore, Section 4944 constituted the mode of procedure to be observed by county courts in the submission of the question of the adoption of township organization to the voters. The Court held that there was no repeal by implication, neither were there words in Section 4944 expressly repealing Section 13165, which express words or other equally effective evidence of the intention of the Legislature to repeal Section 13165 must necessarily have been in Section 4944 to effect a repeal. The Court in its discussion of that question and in holding that there was no repeal, either express or implied, of the previously enacted township organization statute, l.c. 616, 617, said:

> "It is not contended, however, that there was a failure to comply with this section, but that a compliance therewith was unauthorized in that the question should have been submitted under a provision of what is now Section 4944, Revised Statutes 1919, enacted in 1909 (Laws 1909, p. 492), subsequently amended, but not in regard to the provision here under consideration. This section is embodied in and, so far as all of its material features are concerned, constitutes the statute regulating the manner in which constitutional amendments or the adoption of a new constitution is required to be submitted. Inserted in this section, and upon which relator relies to sustain his contention, is the following provision: 'Every other proposition to be submitted at the general election shall be proposed and submitted on the "constitutional ballot," as herein provided, if any proposed constitutional amendments are submitted at such election or not.'
>
> "While not so expressly stated, the operative effect of this provision, according to relator's contention, must in its final analysis rest upon the rule of construction that Section 4944, having been enacted subsequently to Section 13165, repeals the latter and therefore constitutes the mode of procedure to be observed by county courts in the submission of township organization to the voters.

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> "In the absence of any words in the enactment of Section 4944 declaratory of a legislative purpose to repeal all former acts prescribing the manner in which propositions other than constitutional amendments are to be submitted to the people, the effect, if any, of the adoption of said section upon Section 13165 must be by implication. It being necessary that there be present in the later act such declaratory words or some other equally cogent evidence of a purpose on the part of the Legislature to repeal the earlier section in the adoption of the later. Cases illustrative of the rule requiring such words or the presence of such an intention are found in the interpretation of acts prescribing a form of ballot in a particular case in an election for the organization of a village, the establishment of a high school district or the issuance of bonds of a county; in each of which cases it was held that the acts especially applicable thereto were not repealed by subsequent general laws which prescribed a form of ballot other than that required by the particular statute. * * * (Citing cases.)

The Court did hold the said sentence in Section 4944, R.S. Mo. 1919, invalid, because the title of the Bill enacting said constitutional ballot section contained no words indicating that the body of the section would require that: "Every other proposition, including referendum and initiative measures, to be submitted at the general election shall be proposed and submitted on the 'Constitutional Ballot,'". Section 125.050, RSMo 1949, contains the same precise sentence and in other respects is the same section as was Section 4944. This section was numbered Section 11680, R.S. Mo. 1939. That section was repealed, Laws of Missouri, 1949, page 261, and a new section in lieu thereof, to be known as Section 11680 was enacted. The title of the new section does now refer to "other propositions, or other subjects" as well as constitutional amendments, referendum and initiative measures. The Court discussed in its decision the vital question of which of the two Acts should be followed with respect to procedure to be pursued in the submission at the General Election of other propositions provided for in separate, independent statutes, such as Section 13165, providing for township organization elections, and held that

Section 13165 should be followed in its decision of the case.

The Court ruled in that case that, because there were no express words in said Section 4944, the then constitutional ballot statute, repealing Section 13165, the then township organization statute, and, that since Section 13165 had special application to a particular subject, and since said Section 4944 was general in its terms and if standing alone would contain the same matter and thereby conflict with the independent statute, Section 13165, that the latter must be, and was, construed by the Court to be an exception from the terms of Section 4944, and, therefore, was not subject to the terms of said Section 4944, and should control in the decision of the question.

The Court on these principles involved in such conflict, and in expressing its disapproval of the impropriety of attempting to amend statutes especially applicable to particular subjects by enacting sections, general in their nature, without express words repealing the special statutes, l.c. 617, 618, further held:

> "Aside from what has been said as to the absence of any declaratory words or other expressed purpose to repeal the particular statute of which Section 13165 is a part by the enactment of the provision in question incorporated in Section 4944, the matter still presenting itself for determination is as to which of these acts prescribes the course of procedure to be pursued by the county court.
>
> "That the two statutes are in conflict, it is evident. We have said, not once, but a number of times, that where there are two acts and the provisions of one have special application to a particular subject and the other is general in its terms and if standing alone would include the same matter and thus conflict with the special act, then the latter must be construed as excepted out of the provisions of the general act, and hence not affected by the enactment of the latter. This, of course, on the assumption that the general act is in other respects valid and would, but for the exception, suffice to

> prescribe thereafter the county court's course of procedure. (Hurlburt v. Bush, 284 Mo. 397; State ex rel. Jones v. Chariton Dr. Dist., 252 Mo. l.c. 353; State ex inf. Major v. Amick, 247 Mo. l.c. 292.)
>
> "The manner, here attempted to be pursued, of amending statutes especially applicable to particular subjects, of which we have many in the body of our law, aside from the question of the validity of the one here under consideration, which we will discuss later, should not receive judicial sanction; first, because as we have shown it violates well recognized canons of construction; and, second, because it can only result in confusion or misunderstanding as to the application of the amendment until it has been judicially construed or supplemented by further legislation."

It follows that the ruling of the Court in the Barrett case is conclusively in point and applicable here. Section 108.060, RSMo 1949, provides a particular method to be followed in the printing of the ballot and the form of the ballot to be used in county bond elections. There are no words in Section 125.050, our present constitutional ballot statute, repealing Section 108.060. The two sections conflict in the form of the ballot prescribed in each of the two sections upon which the county bond issue shall be submitted. It is plain, therefore, that under the decision of the Supreme Court in the Barrett case, Section 108.060 must be held to be an exception to Section 125.050, and, therefore, not affected by the terms of Section 125.050.

The ruling of the Court in the Barrett case holding a township organization election valid where the proposition to adopt or reject township organization was submitted on the party candidates' ballots disregarding the terms of said Section 4944, constitutes a conclusive and continuing precedent for this opinion to hold, and we do so hold, that the printing of the ballot and the form of ballot to be used in the submission to the electorate of a county bond issue proposition will likewise be valid as provided and in the form of ballot prescribed in

Honorable John P. Ryan:

Section 108.060, RSMo 1949, a statute relating specifically to that subject and to disregard in such proceedings the terms of said Section 125.050 providing that: "Every other proposition, including referendum and initiative measures, to be submitted at the general election shall be proposed and submitted on the 'Constitutional Ballot,' as herein provided, if any proposed constitutional amendments are submitted at such election or not."

Considering the statutes themselves and the decision of the Supreme Court in the Barrett case it is clear that Section 125.050 requiring that "Every other proposition, including referendum and initiative measures, to be submitted at the general election shall be proposed and submitted on the 'Constitutional Ballot'" does not nullify or supersede Section 108.060, RSMo 1949, which provides a specific method for the form of the ballot and the manner in which it shall be printed in the submission of a county bond proposition to the electors of Jackson County, Missouri, at the General Election to be held in said county in the State of Missouri on November 4, 1952, and that such Section 108.060 constitutes an exception to Section 125.050, RSMo 1949, and should be followed in said bond election.

CONCLUSION.

Considering the premises, it is the opinion of this Department:

1) That the constitutional ballot section, 125.050, RSMo 1949, does not nullify or supersede Section 108.060, RSMo 1949;

2) That the proposed county bond issue proposition to be submitted to the voters of Jackson County, Missouri, at the General Election held in said county on November 4, 1952, should not be placed on the constitutional ballot nor in the form thereof, under the terms of Section 125.050, RSMo 1949;

3) That Section 108.060, RSMo 1949, as an independent statute dealing with a specific subject, constitutes an exception to Section 125.050, RSMo 1949, and that said county bond issue proposition should be submitted to the voters of said county on a separate ballot, printed and in the form

Honorable John P. Ryan:

as prescribed in Section 108.060, RSMo 1949, disregarding the provisions of said Section 125.050.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GWC:irk

COUNTY COURTS: Section 270.090, RSMo 1949, makes it mandatory upon a county court, upon petition of 100 householders
STOCK LAW: anywhere within such county to submit the issue of invoking the stock law at a general election held in such county and it is discretionary with county court as to whether such issue is to be submitted at a special election preceding any general election. Under Section 270.130, RSMo 1949, a single township within county is not authorized to petition the county court to hold an election to invoke the stock law within such single township.

FILED
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February 20, 1952

2-20-52

Honorable Jerry B. Schnapp
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Sir:

The following opinion is rendered in reply to your recent request reading as follows:

> "The County Court of Madison County, Missouri has requested that I secure an opinion from you under Chapter 270 of the Missouri Revised Statutes of 1949. The question is, whether or not a petition of one hundred householders of a Township in the County is sufficient to submit the question of restraining animals from running at large at a general election or at a special election. This question arises under Section 270.090 and Section 270.130 of the Missouri Revised Statutes of 1949.
>
> "It is my interpretation of the said Statutes that providing the requirements of the Sections are met that it is mandatory to submit a question at a general election and further that the County Court does have the discretion as to whether or not to submit the question at a special election.
>
> "I would certainly appreciate your opinion in this matter."

As we view the above quoted inquiry, we feel that three main questions are presented as follows:

> 1. Does the language of Section 270.090, RSMo 1949, cast a mandatory duty on the county court, upon the petition of one hundred householders of the county, to submit the issue of invoking the stock law at a general election?

2. In a county-wide election held under Section 270.090, RSMo 1949, may the one hundred householders, petitioners for such election, be residents of a single township in the county?

3. Under Section 270.130, RSMo 1949, may a single township in a county petition the county court to submit the issue of invoking the stock law within such township at a general or special election?

An answer to the first two questions submitted depends on the construction to be given Section 270.090, RSMo 1949, which provides as follows:

"The county court of any county in this state, upon the petition of one hundred householders of such county, at a general election, and may upon such petition of one hundred householders, at a special election, called for that purpose, cause to be submitted to the qualified voters of such county the question of enforcing, in such county, the provisions of this chapter. Said petitioners shall state in their petition to said court what species of the domestic animals enumerated in section 270.010 they desire the provisions of this chapter enforced against, and may include one or more of said animals in said petition; and said court shall cause notice to be given that such vote will be taken, by publishing notice of the same in a newspaper published in such county, for three weeks consecutively, the last insertion of which shall be at least ten days before the day of such election, and by posting up printed notices thereof at three of the most public places in each township in such county, at least twenty days before said election; said notices shall state what species of domestic animals on which the vote will be taken, to enforce the provisions of this chapter against running at large in such county, which shall be the same as petitioned for to said court."

The wording of Section 270.090, RSMo 1949, quoted above, does contain ambiguity in that it fails to disclose on its face a mandatory duty devolving on the county court to call the election

referred to therein at a general election. It is possible to clear up this ambiguity if we insert the word "shall" after the word "state" appearing in the second line of the statute.

The appellate courts of Missouri have established a rule of law governing the construction of a statute when the meaning thereof is not clear. The Springfield Court of Appeals in State v. Mooneyham, 253 S.W. 1098, l.c. 1100 said:

> "If the intent of the Legislature is reasonably clear, then all grammatical errors and errors in spelling and punctuation are disregarded or corrected. The meaning of words may be limited, restricted, or expanded by construction of the courts, when it becomes necessary in order to make the law harmonize with reason and properly express what was in fact intended by the lawmakers in enacting the law. St. Louis v. Christian Bros. College, 257 Mo. 541, 552; 165 S.W. 1057; Stack v. General Baking Co., 283 Mo. 396, 410-413, 223 S.W. 89. To accomplish the same purpose, words omitted may be read into the statute. Lewis' Sutherland, Statutory Construction (2d Ed.) § 382; State ex rel. v. King, 44 Mo. 238. For the same reason, a word, phrase, or sentence may be read out of the statute. State ex rel. v. Sheehan, 269 Mo. 421, 427, 190 S.W. 864."

By reading the word "shall" into the second line of Section 270.090, RSMo 1949, immediately after the word "state", we have the meaning of the statute clearly stated and find that a mandatory duty is put upon the county court to submit the matter of adoption of the stock law within the county at a general election when one hundred householders of the county petition for the same. Under the statute the county court may exercise its discretion as to whether to submit the issue at a special election preceding any general election.

The second question posed in the inquiry seeks to determine whether or not the one hundred householders of the county petitioning for such election may be obtained from a single township within the county. It must be kept in mind that this particular section, Section 270.090, RSMo 1949, provides for a county-wide election and not for an election in any single township or in several townships. The only requirement we find in this statute relative to the location of the one hundred petitioning householders is that they be "of such county." Consequently, we are unable to read into

the statute any additional provision which would prohibit the householders from being located in any single township in the county.

The third question posed in the inquiry involves Section 270.130, RSMo 1949, which provides as follows:

> "Whenever two or more townships in one body in any county in the state of Missouri, by petition of one hundred householders, not less than ten of whom shall be from any one of said townships, petition the county court for the privilege to vote on the question of restraining horses, mules, asses, cattle, goats, swine and sheep from running at large, the same law governing counties is hereby applied to said townships, and said petitioners shall not be debarred the right to restrain said animals if a majority of the qualified voters of said townships, voting at any general or special election, shall vote in favor of so restraining such animals. Nothing in this section shall be so construed as to debar the right of restraining any two or more species of such animals; provided, however, that nothing in this section or chapter shall be construed to prevent the petitioning for and holding of an election to permit animals to run at large in any township or townships that have voted to restrain said animals from running at large, notwithstanding the county or township has theretofore voted to restrain animals from running at large."

The above quoted statute is clearly applicable only in those cases where two or more townships in one body petition the county court to call an election within such townships in order to invoke the stock law therein. In such case the statute clearly states that the one hundred householders who are petitioning for the election shall be residents from such townships and that not less than ten thereof shall be from each of the townships which are acting in one body to invoke the stock law within the townships.

The clear language of this statute rules out any possibility that petitioners in a single township within the county may petition the county court to call an election within that township with a view to invoking the stock law therein.

Honorable Jerry B. Schnapp

CONCLUSION

It is the opinion of this office that under the provisions of Section 270.090, RSMo 1949, a mandatory duty is cast upon the county court, upon petition of one hundred householders anywhere within said county, to call an election to invoke the stock law at a general election held in such county, and it is discretionary with the county court as to whether it will submit the issue at a special election preceding any general election.

It is the further opinion of this office that under provisions of Section 270.130, RSMo 1949, a single township in any county may not, by petition of one hundred householders, cause the county court to call an election therein for the purpose of invoking the stock law.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:ba

COUNTY COURT:
LAW LIBRARY:

A county court of a county of the fourth class has no authority to establish and maintain a law library for the use of the circuit judge, prosecuting attorney and members of the county bar.

April 18, 1952

FILED
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5/2/52

Honorable Jerry B. Schnapp
Prosecuting Attorney of
Madison County
Fredericktown, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this department. Your request reads as follows:

> "Is a County Court of the 4th Class permitted by law to purchase and maintain a Law Library for use of non-resident Circuit Judge, County Prosecuting Attorney and Members of the County Bar?"

Section 7, Article VI, Constitution of Missouri 1945, provides that in each county not framing and adopting its own charter or adopting an alternative form of county government, there shall be a county court and prescribes the duties of the court as follows:

> "In each county not framing and adopting its own charter or adopting an alternative form of county government, there shall be elected a county court of three members, which shall manage all county business as prescribed by law, * * *."
>
> (Underscoring ours.)

It is generally stated that county courts are courts of limited jurisdiction and aside from the management of the fiscal affairs of the county, possesses no powers except those conferred by statute. We direct your attention to 20 C. J. S., Counties, Section 82, Page 849, wherein it is stated:

> "It is well settled that a county board possesses and can exercise such powers, and such powers only, as are expressly conferred on it by the constitution or statutes of the state, or such powers as arise by necessary implication from those expressly granted or such as are requisite to the performance of the duties which are imposed on it by law. It must necessarily possess an authority commensurate with its public trusts and duties."

This rule has been adopted by the Supreme Court of Missouri in the case of King v. Maries County, 297 Mo. 488, l. c. 496, wherein the court said:

> "It has been held uniformly that county courts are not the general agents of the counties, or of the State. Their powers are limited and defined by law. They have only such authority as is expressly granted them by statute. (Butler v. Sullivan County, 108 Mo. 630; Sturgeon v. Hampton, 88 Mo. 203; Bayless v. Gibbs, 251 Mo. 492; Steines v. Franklin County, 48 Mo. 167.) This is qualified by the rule that the express grant of power carries with it such implied powers as are necessary to carry out or make effectual the purposes of the authority expressly granted. (Sheidley v. Lynch, 95 Mo. 487; Walker v. Linn County, 72 Mo. 650; State ex rel. Bybee v. Hackmann, 276 Mo. 110.)"

See also Jefferson County v. Cowan, 54 Mo. 234, Missouri Electric Power Company v. City of Mountain Grove, 352 Mo. 262, State ex rel. Moser v. Montgomery, 238 Mo. App. 1228.

The term "as prescribed by law" as used in Section 7, Article VI of the Constitution, has been interpreted by the courts of this state to mean as prescribed by statute. We have been unable to find any statutory provision authorizing the county court of a county of the fourth class to purchase and maintain a law library for the use

of a non-resident circuit judge, prosecuting attorney and members of the county bar, nor do we believe that the authority to establish and maintain such a library may be implied from any express grant of power and therefore, must conclude under the foregoing cited cases and authority that the county court has no such authority. In arriving at such conclusion we do not mean to pass upon the right, power or authority of a county court to maintain a library for the prosecuting attorney, since you apparently refer to a library other than such and for a different purpose.

CONCLUSION

Therefore, it is the opinion of this department that a county court of a county of the fourth class has no authority to establish and maintain a law library for the use of a non-resident circuit judge, county prosecuting attorney and members of the county bar, since such authority has not been expressly conferred by statute and since it cannot be reasonably implied from any express grant of power.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DDG:hr

COUNTY SCHOOL SUPERINTENDENT: SECRETARY'S SALARY: Salary of secretary to county school superintendent is limited to $1500 per annum. Money provided by law for traveling expenses of superintendent cannot be diverted to payment of secretary's salary.

FILED 81

January 31, 1952

2-1-52

Honorable D. W. Sherman, Jr.
Prosecuting Attorney
Lafayette County
Lexington, Missouri

Dear Mr. Sherman:

We have your letter in which you request an opinion of this department. Your letter is as follows:

> "Mr. H. H. Schaeperkoetter, Superintendent of schools of this county, has requested that I write your office and ask for an opinion as to whether the County Court can pay to the secretary of the Superintendent of schools a salary above Fifteen Hundred Dollars($1500.00) per year by applying the surplus left from the County Superintendent's expenses for traveling, on said secretary's salary, in accordance with Section 167.230, Mo. R.S., 1949."

We have also read your opinion rendered under date of October 22, 1951, addressed to Honorable H.H. Schaeperkoetter, superintendent of schools of Lafayette County, Missouri in which you held that the salary of the county superintendent of schools cannot exceed the $125.00 per month fixed by the provisions of Section 167.230 RSMo. 1949, and in which you further held that traveling expense money provided for the county school superintendent by said section cannot be used in part for the salary of the secretary of said superintendent. We have examined the aforesaid section 167.230, supra, which section we quote, in part, as follows:

> "The county superintendent of public schools shall be allowed out of the county treasury not to exceed twenty-five per cent of his annual salary for actual and necessary traveling expenses. The county superintendent of public schools shall be permitted to employ clerical assistance, to whom there shall be paid not less than seven hundred and fifty dollars nor more than one thousand five hundred dollars annually to be determined and fixed by the county court, seven

> hundred and fifty dollars of which shall be paid by the state out of state school moneys, the same to be included by the state board of education as a part of the apportionment made before August thirty-first of each year. * * *"

We suggest the fact that no statute could be more explicit in defining the limits of a salary than is this one in the use of the following language:"* * *to whom there shall be paid not less than seven hundred and fifty dollars nor more than one thousand five hundred dollars annually to be determined and fixed by the county court * * *"

We are of the opinion that the above language precludes the payment of more than $1500 per annum to a secretary for the county school superintendent for work done in that capacity.

We also call attention to the fact that the statute is very specific as to the use of the money provided as expense money for the county school superintendent and limits the use of such money to actual and necessary traveling expenses thereby precluding the possibility of diverting some of it for payment of a secretary's salary.

CONCLUSION

We are of the opinion that none of the expense money provided for by said section 167.230 RSMo 1949, may be diverted to payment of the salary of the superintendent's secretary and that said secretary cannot be paid in excess of $1500 per annum for service rendered the county in her capacity as secretary to the county school superintendent.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SMW:mw

ADJUTANT GENERAL:)
ARMORIES:)
APPROPRIATIONS:)
FUNDS:)

Adjutant General authorized to accept moneys from the Federal Government to construct armories, providing the construction is accomplished by compliance with state laws relating to public works.

March 15, 1952

3-19-52

Major General A. D. Sheppard
The Adjutant General
State of Missouri
Jefferson City, Missouri

FILED
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Dear General Sheppard:

This is in reply to your request for an opinion, which we will restate for the purpose of brevity.

> By Public Law 783 (National Defense Facilities Act of 1950) Congress has provided for contributions to states of funds for the acquisition, construction, expansion, rehabilitation or conversion by the states of additional facilities made necessary by an increase in strength of the National Guard of the United States or the Air National Guard of the United States.
>
> The National Guard Bureau has prepared a Master Agreement to cover all funds contributed to the states for constructions under the provisions of Public Law 783. This master agreement provides that engineering and construction work may be performed by the state, and the state is empowered to enter into and administer appropriate contracts for such construction as may be authorized under the agreement. The contract provides that the state is to execute construction or supply contracts under regulations, procedures and policies in current use by the Government insofar as these do not conflict with requirements of State law. The contract

> further provides that the agreement is to remain in full force and effect for a period of twenty-five (25) years from date of acceptance by the state and government of each facility constructed hereunder, which period is agreed to be the approximate lifetime of the facility. The state agrees to maintain and preserve all facilities in a state of good repair at its own expense and agrees to make no disposition or use of such facilities which will interfere with its use by the Reserve Forces of the United States. An opinion is requested as to whether or not under state law moneys appropriated for the construction of state armories may be expended in collaboration with the Federal Government in contractural procedures as outlined in the Master Agreement, particularly in view of the provisions which have been specifically set out in this request, or must there be enabling legislation specifically authorizing the joint contracts.

The authority for the construction of armories in this state has been vested in the Adjutant General by House Bill No. 133, Laws of Missouri, 1951, (V.A.M.S., Section 41.200 (13)), which is as follows:

> "13. He shall have control of all armories that are owned, erected, purchased, leased or provided by the state. The adjutant general, in the name of the state of Missouri, may acquire by purchase and may receive by donation or dedication any property which may be used for military purposes. For the control and management of armories described in this section, the adjutant general may establish

> armory boards, the personnel of which shall serve without pay. Such boards, subject to the direction of the adjutant general, shall control, manage and supervise all activities in such armories and may rent such armories to persons or organizations not connected with the organized militia."

There are statutes generally providing for the method of letting construction contracts by the state and certain political subdivisions. Section 8.250, RSMo 1949, provides for advertising for bids for construction projects, and Sections 8.260 and 8.270 provide for the methods of payments of the amounts due for the construction work. Section 8.280 provides that Missouri products shall be used in construction or repair of public buildings under stated circumstances. Section 107.170 provides that contractors for public works must furnish a bond conditioned upon the performance of the work and further conditioned upon the payment of certain claims.

It is, of course, the duty of the Adjutant General to follow the statutes directing the manner and method of letting contracts for public works. These statutes have been enacted for the protection of the public and must be followed in order to justify the expenditure of public moneys. It is to be noted that Section 41.200 (13) provides that the Adjutant General may receive by donation or dedication any property which may be used for military purposes. This is a general grant of power, and in connection therewith it is to be noted that property includes real and personal property (Section 1.020, (11), RSMo 1949). Therefore, it would appear that the Adjutant General has been given the authority to receive moneys for military purposes. We do not believe it can be questioned but that the construction of facilities for the use of the military is for military purposes.

We further note that the Master Agreement provides that the engineering and construction work may be contracted for by the state, and the requirements of the state law may

be met. Under these conditions we believe that the Adjutant General is authorized to enter into such agreements for the construction of facilities to be used for military purposes under present law and no enabling legislation (except, of course, an appropriation therefor) is necessary.

However, it should be emphasized that the Adjutant General must comply with the state procedures for the letting of the contracts, and no agreement which he may enter into may in any way interfere with this duty to follow the requirements of a state law.

However, we do find that the provision concerning the period of the agreement and the obligation of the state to maintain and preserve the facilities constructed under the agreement are not authorized under state law. The Adjutant General has been given no authority to enter into an agreement for such a length of time, and in any event such an agreement is necessarily subject to the action of future legislators in appropriating money to carry out the agreement. We note, however, that Article VI of the Master Agreement provides for alterations of the provisions of the agreement and believe that the deletion of the objectionable clauses may be acceptable to the contracting authority of the United States Government. In this connection we are unable to find any provision in Public Law 783 which makes such a requirement, and few state legislatures would be authorized to enter into such agreement inasmuch as legislatures generally may not restrict or limit the power of its successors (12 C.J., page 806).

CONCLUSION

Therefore, it is the opinion of this department that enabling legislation is not necessary to permit the Adjutant General to accept public funds for the purpose of constructing

Major General A. D. Sheppard

armories when the conditions attached to the grants are such as to enable the Adjutant General to follow applicable state laws concerning the construction of public works.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JRB/fwh

FEES:
MAGISTRATE COURT:
SHERIFFS:
PROSECUTING ATTORNEYS:

1. In cases where a fine has been assessed against a defendant and the defendant is unable to pay the costs or fine or both, and serves out the fine in jail, or where a jail sentence is assessed, that the county is liable for the $2.50 magistrate fee.



2. In situations such as are set forth in part 1 of this conclusion, the county would not be liable to pay the fee of the sheriff or the prosecuting attorney.

4/21/52

April 17, 1952

Honorable Samuel Semple
Prosecuting Attorney
Randolph County
Moberly, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion. You thus state your opinion request:

> "This office would like to obtain an opinion from your office on fees due the magistrate court, the sheriff and the prosecuting attorney in misdemeanor cases in magistrate court. The cases that we have in question are those cases in which either a fine is assessed against the defendant and the defendant being unable to pay the fine or costs serves out the fine in jail, or in those cases where a jail sentence is assessed. In those situations, is the county liable for the payment of the magistrate fees of $2.50 in each case which are in turn sent by the magistrate to the state of Missouri, and is the county liable to pay the sheriff's fees and the prosecuting attorney's fees in these cases where the sheriff and the prosecuting attorney are then required to turn around and turn the money back in to the county."

In regard to this matter we would first direct your attention to Section 550.030, RSMo 1949, which section reads as follows:

> "When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

It would seem to be clear that the above section means that the county is liable for the costs when the defendant is unable to pay the costs or the fine, as well as when he is able to pay the fine but not the costs, or where he is sentenced to imprisonment in jail.

We also note that "costs" as referred to in Section 550.030, supra, include the magistrate's fee, the sheriff's fee, and the fee of the prosecuting attorney.

Let us first consider payment of the magistrate's fee in this situation.

Part 2 of Section 483.610, RSMo 1949, states:

> "In each criminal proceeding and in each preliminary hearing instituted in any magistrate court, a magistrate court fee of two dollars and fifty cents shall be allowed and collected to be in full for the services of the magistrate or the clerk of said court. Such fees shall be charged, collected, and disposition thereof shall be made as provided by law applicable thereto."

Parts 2, 3, and 4 of Section 483.615, RSMo 1949, state:

> "2. Except as provided in section 483.620, it shall be the duty of each clerk of the magistrate court, with the approval of the magistrate to charge upon behalf of the state every fee that accrues in his office and to receive the same, and at the end of each month, pay over to the director of revenue all

> moneys collected by him as fees, taking two receipts therefor, one of which he shall immediately file with the state treasurer and shall at the end of each month make out an itemized and accurate list of all fees collected by him, or by the magistrate, giving the name of the person or persons paying the same, and turn the same over to the director of revenue, said report to be verified by affidavit.
>
> "3. On or before the thirty-first day of January of each year the clerk of the magistrate court shall file a verified report with the director of revenue showing all fees due and unpaid in his office in cases where the liability therefor has been finally determined and established during the preceding year, showing the name of the person or persons owing same and stating that he has been unable, after the exercise of diligence, to collect the same. The director of revenue shall collect such unpaid fees and shall have the same rights in connection with the judgment therefor as the prevailing party in the litigation.
>
> "4. All magistrate fees received by the director of revenue shall be deposited by him with the state treasurer in a special fund to be denominated 'magistrate fund,' and all moneys in said fund shall be used exclusively for the payment of salaries of magistrates, their clerks, deputies and employees and for the payment of the cost of any surety bonds furnished by a clerk or deputy clerk; provided, however, that such salaries may also be paid from the general revenue of the state whenever either the balance in the magistrate fund or the appropriation from such fund is insufficient to pay such salaries."

Part 2 of Section 483.610, supra, fixes the magistrate fee at $2.50 in a criminal case; part 2 of Section 483.615, supra, directs that such fee be paid to the state; and Section 550.030, supra, makes the county liable for costs in instances such as

you present. It would therefore follow that the county would be liable for the $2.50 magistrate fee which is to be paid to the state.

In regard to the payment of the sheriff's fee in such cases as we are considering, we direct your attention to Section 57.410, RSMo 1949, which section states:

> "In all counties of the third and fourth classes, the sheriff shall charge and collect for and on behalf of the county every fee accruing to his office which arises out of his duties in connection with the investigation, arrest, prosecution, care, commitment and transportation of persons accused of or convicted of a criminal offense, except such criminal fees as are chargeable to the county. The sheriff may retain all fees collected by him in civil matters."

In view of the above section it would appear to be clear that where the county is liable to pay the costs that the sheriff shall not collect his fee.

In regard to the payment of the fee of the prosecuting attorney, we direct your attention to Section 56.340, RSMo 1949, which section states:

> "The prosecuting attorney, in counties of the second, third and fourth classes, shall charge upon behalf of the county every fee that accrues in his office and receive the same, and at the end of each month, pay over to the county treasury all moneys collected by him as fees, taking two receipts therefor, one of which he will immediately file with the clerk of the county court, and shall at the same time make out an itemized and accurate list of all fees in his office which have been collected by him, and one of all fees due his office which have not been paid, giving the name of the person or persons paying or owing the same, and turn the same over to the county court, stating that he has been unable, after the exercise of diligence, to collect the part unpaid, said report to be verified

> by affidavit, and it shall be the duty of the county court to cause the fees unpaid to be collected by law, and to cause the same when collected to be turned over to the county treasury."

From the above section it would seem to be clear that in such situations as you present, the prosecuting attorney should not collect his fee, as it is his duty to collect on behalf of the county and not from the county.

CONCLUSION

It is the opinion of this department that:

1. In cases where a fine has been assessed against a defendant and the defendant is unable to pay the costs or fine or both, and serves out the fine in jail, or where a jail sentence is assessed, that the county is liable for the $2.50 magistrate fee.

2. That in situations such as are set forth in part 1 of this conclusion, the county would not be liable to pay the fee of the sheriff or the prosecuting attorney.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HPWab

BANKS: State chartered bank in solvent condition may, with approval of Commissioner of Finance, voluntarily dissolve under provisions of general and business corporation laws, Chap. 351, RSMo 1949.

FILED
81

June 4, 1952

6-5-52

Honorable H. G. Shaffner, Commissioner
Division of Finance
Department of Business and Administration
Jefferson City, Missouri

Dear Mr. Shaffner:

The following opinion is rendered in answer to your request which reads as follows:

> "A state chartered bank is now considering ceasing business and has in mind the dissolution of the corporation.
>
> "It appears the only sections of the statutes which provide for the dissolution of a corporation are 361.460 through 361.480, General and Business Corporations, found on page 2715, Missouri Revised Statutes, 1949.
>
> "In the absence of provisions for dissolution in the banking laws, may we be advised how to proceed."

The reference in the second paragraph of your request inadvertently refers to Sections 361.460 to 361.480, inclusive, RSMo 1949. For the purpose of this opinion it is assumed that you intended to refer to Sections 351.460 to 351.480, inclusive, of Chapter 351, RSMo 1949, such chapter being known as The General and Business Corporation Law of Missouri.

This opinion deals solely with the right of a solvent State chartered bank to voluntarily dissolve and cease business as a banking corporation, and in no respect does the opinion deal with statutory sale, merger or consolidation of a State banking corporation.

A review of the statutes particularly applicable to State banks, as found in Chapter 362, RSMo 1949, though found to contain provisions for the liquidation of insolvent

banks and for statutory sale, merger or consolidation, does not encompass a situation where a solvent bank desires to voluntarily liquidate and surrender its corporate charter. The general rule touching this problem is found stated in 7 Am. Jur., Banks, Sec. 826, as follows:

> "Though a bank may be subject to regulation under the police power of the state, it is nevertheless a private, as distinguished from a public, corporation where its stock is owned by private persons; it owes no duty of public service, and hence may voluntarily go out of business and liquidate its holdings. Such right exists in the case of a savings bank to the same extent as in the case of any other private corporation. It is in the public interest to have savings banks successful, but that interest is no indication of public right to have them continue to do business while they remain successful. Furthermore, no legislative prohibition of a savings bank from going out of business so long as it is solvent and properly managed may be implied from statutes authorizing or requiring the liquidation of mismanaged or insolvent savings banks."

In the case of Haight v. Stewart, 278 S.W. 1091, 220 Mo. App. 78, the Springfield court of appeals was passing on the right of a State chartered bank which was solvent, though in failing condition, to liquidate its own affairs and pay off its depositors and creditors and effect dissolution under the general law applicable to private corporations. In the course of its opinion the court reviewed the case of Koch v. Missouri Lincoln Trust Company, 181 S.W. 44, and the case of Citizens Trust Company v. Tindle, 272 Mo. 681, 199 S.W. 1026, and in sustaining the right of the State chartered bank to dissolve under the general law applicable to private corporations made the following conclusions, found at 220 Mo. App. l.c. 83:

> "Considering the Koch case (supra) and in the light of the Citizens Trust Company case (supra) we hold that a bank which is solvent, although in a failing condition,

> has authority to liquidate its own affairs and pay off its depositors and creditors, at least when so directed by the state banking commissioner as in this case. This is in harmony with the spirit of the State Banking Act as we interpret it. After the depositors and creditors have been paid, and the bank has closed its doors, there is nothing pertaining to the final dissolution of the corporation which should require action from the banking commissioner. The whole purpose of the act was to secure honest and economical administration of the assets of the bank and the Trust Company case (supra) so holds. That purpose having been fulfilled under orders from the banking commissioner, the bank should have authority to secure dissolution in the most expeditious and inexpensive way possible. Changing possession merely for the purpose of dissolution would necessarily entail additional expense and serve no useful purpose."

The ruling in the Haight case cited above serves to draw attention to the duties of the Commissioner of the Division of Finance insofar as he is to safeguard the positions of depositors and creditors of banks operating under the State Banking Act, while at the same time recognizing the right of a State banking corporation to dissolve under the general and business corporation law of Missouri, when any such bank is in a solvent condition.

CONCLUSION

It is the opinion of this department that a State chartered bank enjoying a position of solvency may, with the approval of the Commissioner of the Division of Finance, voluntarily dissolve and extinguish its corporate existence under procedures outlined in Chapter 351, RSMo, 1949, providing for the voluntary dissolution of general and business corporations.

Respectfully submitted,

APPROVED:

JULIAN L. O'MALLEY
Assistant Attorney General

J. E. TAYLOR
Attorney General

JLO'M:lw

BANKS: State banks may issue capital notes pursuant to authority contained in Sec. 362.120, RSMo, 1949, though no impairment of capital exists.

FILED
81

June 16, 1952

6-17-52

Honorable H. G. Shaffner
Commissioner of the Division of Finance
Department of Business and Administration
Jefferson City, Missouri

Dear Mr. Shaffner:

The following opinion is rendered in answer to your inquiry reading as follows:

> "Several state chartered banks have indicated that they would like to issue capital notes in order to further strengthen their capital accounts. Chapter 362, specifically Section 362.120, makes certain provisions under which capital notes may be issued.
>
> Kindly render an opinion relative to whether or not a state chartered bank may issue capital notes when ~~their~~ there is no impairment of capital."

Section 362.120, RSMo, 1949, provides as follows:

> "1. Any bank or trust company organized under the laws of this state may, through action of its board of directors and without requiring any action by stockholders, with the written consent of the finance commissioner, issue and sell at not less than par its capital notes.
>
> 2. If, at the time of the issuance of such capital notes the capital of such bank or trust company is impaired, and there shall have been issued and sold

> capital notes of such bank or trust company in accordance with the provisions of sections 362.120 to 362.135, in an amount equal to or more than the impairment of the capital of such bank or trust company, as found by the commissioner of finance, then the capital of such bank or trust company shall for all purposes be deemed to be restored and unimpaired.
>
> 3. Such capital notes may be sold for cash or, with the written consent and approval of the commissioner of finance, for property and they shall be of a nature specified in, and conform to, the requirements of the several provisions of sections 362.120 to 362.135."

The power to issue capital notes with the written consent of the Commissioner of the Division of Finance, is clearly reflected in sub-paragraph 1 of the above quoted section, and sub-paragraph 2 of said section definitely discloses that the issuance of such capital notes does not require, as a condition precedent, that an impairment of capital exists.

Section 362.125, RSMo, 1949, provides, in part, as follows:

> "1. Such capital notes shall be in such denominations and the holders thereof shall be entitled to such annual return thereon not exceeding six per cent as the board of directors of such bank or trust company may determine. Such capital notes shall provide that they may be retired at such time or times and in such manner as may be fixed by the board of directors of the bank or trust company, but in no event later than twenty years after the date of their authorization; provided, however, that no bank or trust company shall retire such capital notes if by such retirement an impairment of its capital will be created.
>
> * * * * * * * * * * * *
>
> 4. Such capital notes shall at the time of their issuance be, and shall at all times thereafter remain, subordinate in rank and subject to the prior payment

> of all of the debts and obligations of such bank or trust company except certificates of indebtedness heretofore issued, and such bank or trust company may, for the security and protection of the holders of such capital notes, agree upon such restriction upon the distribution or payment of dividends, on its capital stock as the board of directors may decide; provided, however, that subject to the provisions of sections 362.315, relating to banks, and section 363.470, relating to trust companies, such capital notes and accrued return thereon may be retired in whole or in part, with the written approval of the commissioner of finance upon his determining that the proposed retirement of such capital notes will not result in an impairment of the capital of such bank or trust company to any extent whatever, notwithstanding the debts or obligations of such bank or trust company which are senior in rank to, and are entitled to priority of payment over, such capital notes, have not been paid."

The manner in which capital notes are to be issued and their established priority of payment as outlined in the above quoted excerpts from Section 362.125, RSMo, 1949, disclose that the issuance of capital notes by a banking institution is nothing more or less than an exercise of a bank's power to borrow money.

In Ringling v. Kohn, 6 Mo. App. 333, l.c. 335 we find the following rule stated:

> "The charter gave to the corporation general banking powers in terms such as are usually employed for that purpose. Sess. Acts 1857, p. 642, sect. 6. Nothing is said about borrowing money. But it is elementary law that a corporation may exercise any unforbidden power which is necessary to carry into effect the powers specially granted. It would be a strange limitation of the authority to purchase exchanges, or to loan money, which should deny a simple means of obtaining occasional supplies for the purpose. A specific authority to borrow money rarely, if ever, appears in any bank charter. It has always been esteemed a necessary

> and inherent privilege, inseparable from the exercise of banking functions. Without it no bank, however ample its assets, could at times avoid insolvency. Curtis v. Leavitt, 15 N. Y. 9."

In Cantley v. Drainage District 2 S. W. (2d) 607, 318 Mo. 1120, l.c. 1132, we find the following language:

> "That the bank itself can borrow money and pledge its notes as security for the payment thereof cannot be questioned. It is done every day in the commercial world. Nor is there any limitation as to the person or corporation from whom it may borrow. When we say that banks cannot borrow money we have gutted the modern banking business. When we say that the bank can borrow money, we mean when acting through its board of directors, and the authority given by such board of directors to other agents of the bank."

Under the provisions of Section 362.120, RSMo, 1949 it is not necessary to rely on any general or implied powers of banks for authorization to issue capital notes, for the statute expressly confers the power, to be exercised when written authorization is given by the Commissioner of the Division of Finance.

CONCLUSION

It is the opinion of this department that State chartered banks in Missouri may, pursuant to express authority contained in Section 362.120, RSMo, 1949, issue capital notes though no impairment of capital exists.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:lw

original

Opinion No. 81

August 25, 1952

FILED
81

Major General A. D. Sheppard
The Adjutant General of Missouri
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

"Under provisions of Public Law 829, 80th Congress, the State of Missouri acquired a portion of the former Jefferson Barracks Military Reservation, together with the improvements within the perimeter of the area acquired except telephone, electrical, sewage and water distribution systems. The area was acquired for the use of the military forces of the state, and one of the conditions of the deed was that for a period of twenty years it must be used primarily for the training and maintaining of the civilian components of the Armed Forces of the United States and the State of Missouri, and for no other purpose.

"However, said deed also contained a second provision to the effect that the State nor its assigns will sell, lease or otherwise dispose of any of the property within the period of twenty years from the date of the deed without first obtaining the written consent of the General Services Administrator or his successor in function. For your information a copy of the Quitclaim Deed transferring the property to the State is attached hereto.

"Some of the buildings acquired through this transfer have never been used since they were acquired by the State and stood vacant for an unknown period of time prior to the acquisition by the State. The property acquired has primarily been used as a base for the maintenance and training of elements of the Missouri Air National Guard, however, the development of these units had not reached the point where all of the structures located on this property were required for their use when they were ordered back into the Active Military Service of the United States at various dates between 1 March 1951 and 1 November 1951. As a result of this and the period of rebuilding that will be necessary after their return to the State, it will be at least from three to four years before all of the structures in this property will be required primarily for the organization, maintenance and training of said military forces.

"On or about 29 May an application was received from the Most Reverend Joseph E. Ritter, Archbishop of St. Louis, for the use of Buildings Nos. 27 and 27A for a period of two years as high school facilities in conjunction with the school the Archdiocese is now operating just across the street in Building No. 67 which they obtained from the War Assets Administration.

"After a period of correspondence, an agreement was reached that the Archdiocese of St. Louis would accept these structures in 'as is' condition, and in lieu of cash rental for the use of said structures, agreed to do at its own expense all repairs and conditioning necessary to make such buildings suitable for use, and at the end of the period to return them to the State in condition equal or superior to that in which received.

"This would relieve the State of repair and maintenance costs which it is estimated would be not less than $10,000.00 during the period of proposed use. A copy of the proposed Right of Entry, Use and Occupancy is enclosed herewith for your information and review.

"Under the restriction in the deed mentioned in the second paragraph of this letter, clearance has been received from the Administrator, General Services Administration, to the proposal to grant a Right of Entry, Use and Occupancy under terms indicated. A copy of the correspondence between this office and the General Services Administrator is likewise enclosed for your information.

"An opinion is requested as to whether in the circumstances as outlined above as set forth in the enclosures hereto, the Adjutant General has the legal right and authority under the Constitution and laws of Missouri to execute such a Right of Entry, Use and Occupancy. Also, if your answer is in the affirmative, whether the execution of such Right of Entry, Use and Occupancy would in any way jeopardize the title of the State to the property covered by enclosed Quitclaim deed.

"In view of the early beginning of the school season, it would be appreciated if this matter could be given priority and an opinion supplied at an early date."

The general rule as given in 49 Am. Jur. 270, Section 57, is as follows:

" * * * the state may, as it sees fit, sell or dispose of property real or personal which it holds in a proprietary capacity as any private owner of property may. * * *"

There are no Missouri cases upon this particular proposition, but, as pointed out, the rule in other states is that a state may acquire real or personal property by conveyance, gift, or otherwise, and sell or dispose of it as it sees fit. Adkins v.

Kalter, 171 Ark. 1111, 287 S.W. 388; State v. Corson, 67 N.J.L. 178, 50 A. 780; South San Joaquin Irrig. Dist. v. Neumiller, 2 Cal. (2d) 485, 42 P. (2d) 64. See also Annotation in 169 A.L.R., page 1399.

As pointed out in your request, the State of Missouri at the present time does not have any use for the structures in question, and by leasing the same to the St. Louis Archdiocese the state would be relieved of repair and maintenance cost which it is estimated would be not less than $10,000 during the period of the proposed use.

A similar situation arose in the case of Heger v. City of St. Louis, 323 Mo. 103, 20 S.W. (2d) 665, wherein it was questioned whether the city of St. Louis could lease property acquired for a park until plans could be formulated and necessary funds procured for the establishing of the park. Our Supreme Court said, S.W. (2d) l.c. 668, 669:

> " * * * The commissioners simply found themselves in possession of property which could not immediately be devoted to the use for which it had been condemned. The buildings were valuable and it was thought that some of them might be adapted to legitimate park uses. If not, some disposition might be made of them that would salvage more of their value than to wreck them. Some time was needed to formulate plans as well as to procure funds for the conversion of the newly acquired property in harmony with the existing park of which it was to form a part, so that the whole might best serve the public and carry out the purpose for which it was established. It is not unreasonable that these matters should require some time and careful consideration by the board. In the meantime it would have been unwise to let the houses deteriorate by remaining vacant. To have them occupied by responsible tenants and thus cared for while at the same time producing some revenue which inured to the benefit of the public, rather than allow them to remain vacant and depreciate in value or expend the public funds in employing a caretaker, was but the exercise of sound business judgment. We are not persuaded that such action is opposed to sound public policy."

Major General A. D. Sheppard

Again in Harris v. City of St. Louis, 233 Mo. App. 911, 111 S.W. (2d) 995, the St. Louis Court of Appeals said, in regard to the right of the city of St. Louis to rent the municipal auditorium to private persons, S.W. (2d) l.c. 999:

> " * * * It is the law generally that a City when it owns property that, for a time, cannot be used for a strictly public purpose may rent it for private uses. * * *"

Therefore, under the above authority we believe that the state may lease the buildings which it owns at Jefferson Barracks if at the present time there is no use which can be made of such buildings by the state.

While the technical designation of the contract between the state and archdiocese is a "Right of Entry, Use and Occupancy," still in view of the fact that the archdiocese will make repairs, it is in essence a lease. It is, therefore, our view that the State of Missouri has legal right and authority under the Constitution and laws of Missouri to execute such "Right of Entry, Use and Occupancy."

CONCLUSION

It is, therefore, the opinion of this department that the State of Missouri may execute a "Right of Entry, Use and Occupancy" of said buildings to the Archdiocese of St. Louis for the use of buildings Nos. 27 and 27A, located at Jefferson Barracks, and that the execution of such "Right of Entry, Use and Occupancy" would in no way jeopardize the title of this state to such property.

Respectfully submitted,

Arthur M. O'Keefe

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

J. E. Taylor

J. E. TAYLOR
Attorney General

AMO'K:ml

SCHOOLS: Teacher is not re-employed when school board votes not to re-employ teacher and written notice is given to teacher, signed by president and secretary of board.

FILED
81

August 26, 1952

Honorable William E. Seay
Prosecuting Attorney
Dent County
Salem, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this department, which, in part, reads:

> "A matter has been presented to this office on which I will appreciate your opinion. A school board of six members, but with only five in attendance, failed to re-hire a teacher who is under contract for the present year. The motion upon which the vote was taken provided that all teachers, except this one, be re-employed for the coming 1952-53 school year, and that this one be notified prior to April 15, 1952, that she had not been re-employed. This motion was lost on a vote to two 'yes' and three 'no.' A later motion was made to re-employ all teachers except this one. This motion carried, but it is pointed out that this motion omitted the requirement that this teacher be notified. Subsequently a motion was made that this teacher be re-employed on which the vote stood three 'yes' and two 'no' and the motion was lost because a majority of the entire membership of the board was not cast in favor of the motion.
>
> "Later, but prior to the 15th of April, a notice was given to this teacher advising her in writing that she had not been re-employed for the coming year. This notice

> was signed by the President and the Secretary of the board and was intended to comply with the requirements of Sec. 163.090 RSM 1949.
>
> * * * * *
>
> "Since that time, this teacher has written a letter to the Board asserting her right to teach during the coming year since she considers herself re-hired, and that she will demand payment of her salary from the treasury of the district.
>
> "I will appreciate it very much if you can render your opinion of this subject and advise as whether or not you consider her re-employed or not."

To analyze the action taken by the school board with reference to the hiring of teachers, it appears from the facts which you have presented that the school board, in its meeting where five members were in attendance, took up and voted on three separate motions.

The first motion was to employ all teachers, except the one in question, for the coming 1952-53 school year, and that this one be notified prior to April 15, 1952, that she had not been re-employed. This first motion did not carry. Consequently no teachers were re-employed for the coming school year.

The second motion presented to the board was to re-employ all teachers, except the one in question. Nothing was contained in this motion with regard to giving the particular teacher notice that she was not re-employed. As you have stated in your letter, this second motion carried. Consequently the school board manifested a clear intent to re-employ all teachers, except the one in question.

A third motion was presented to re-employ the teacher who had been excepted in the previous motions. This motion did not carry because a majority of the entire membership of the board was not cast in favor of the motion.

In this connection Section 165.320, RSMo 1949, in part, provides:

> " * * * A majority of the board shall constitute a quorum for the transaction of business, but no contract shall be let, teacher employed, bill approved or warrant ordered unless a majority of the whole board shall vote therefor. * * *"
> (Emphasis ours.)

Thereafter, and prior to April 15, 1952, a written notice was given to the teacher in question, signed by the president and secretary of the school board, advising her that she had not been re-employed for the coming year. It appears that the question which you undertake to present is whether or not it was necessary for the school board, after voting not to re-employ the particular teacher, to also vote on the question of giving her notice as to her lack of re-employment.

With regard to the hiring of teachers, the law is mandatory in requiring a vote of the school board, and as provided in Section 165.320, supra, no teacher may be employed unless a majority of the whole board shall vote therefor.

Where a teacher has been originally employed under a previous contract, Section 163.090, RSMo 1949, requires written notification be given a teacher on or before April 15 of the year in which the contract in force expires of her re-employment or lack thereof. The statute requires the school board to give such notice, and failure to do so constitutes re-employment of the teacher on the same terms as provided in the contract of the current fiscal year. Thus Section 163.090, in part, provides:

> " * * * It shall be the duty of each and every board having one or more teachers under contract to notify each and every such teacher in writing concerning his or her re-employment or lack thereof on or before the fifteenth day of April of the year in which the contract then in force expires. Failure on the part of a board to give such notice shall constitute re-employment on the same terms as those provided in the contract of the current fiscal year; * * *"

While the statute requires the board to give such notice, we do not believe the statute requires the board to vote on the question of giving the notice. In other words, the matter of giving notice is an automatic requirement of the law and is not a matter about which the school board can exercise a choice or discretion by voting thereon.

To otherwise construe the statute could result in an absurd situation if a school board voted not to re-employ a teacher and then voted, either in the same motion or a separate motion, not to give the teacher notice of her lack of re-employment as required by law, knowing that failure to do so did constitute re-employment. In such an instance the board in one motion would be voting not to re-employ the teacher and in the other motion would, in effect, vote to re-employ the teacher.

Under the facts you have presented the school board, in its vote on the second motion, clearly decided not to re-employ the teacher in question.

The written notice given subsequently was signed by the president and secretary of the school board, and as you state in your letter was intended to comply with the requirements of Section 163.090, supra. Therefore, we can only assume that the written notice was given with the knowledge and acquiescence of the school board for the purpose of notifying the teacher of the board's action relative to her continued employment. The notice was signed by the proper officials of the school board, and we therefore believe that there was a substantial compliance with the statute.

A case somewhat in point is Peter v. Kaufmann, 327 Mo. 915, 38 S.W. (2d) 1062. In that case a school election wherein a school levy was voted was being attacked on the theory that no proper notice had been given. Notices of the election were actually posted by the secretary of the school board, but it was contended that since the school board did not specifically order the notices posted they were improper and of no effect. In ruling on the question the court, at S.W. l.c. 1064, said:

> "As to plaintiff's contention that no proper notice had been given embodying these propositions to be voted on at the annual meeting in April, 1927, at which meeting these levies were voted, his contention seems to be only that the school board did not specifically order notices to be posted embodying these propositions to be voted on. * * *

Honorable William E. Seay

> "It is true that the minutes of the board meeting on March 1, 1927, do not show a formal order of the board directing the secretary of the board to post these notices, or prescribing what the notices should contain, but we decline to hold that this is a fatal defect. * * *"

Other cases where a similar situation was being considered by the court, and where the court ruled as it did in the above case, are Breuninger v. Hill, 277 Mo. 239, 210 S.W. 67, and Lowland School Dist. No. 32 v. Wooldridge School Dist. No. 34, 216 S.W. (2d) 545.

Under the facts you have presented the school board voted not to re-employ the teacher, and, as the court in the above case decided, we do not think it was necessary for the school board to make a formal order or adopt a formal motion directing the president and secretary of the board to give written notice to the teacher of the board's action.

CONCLUSION

In the premises, it is the opinion of this department that when the board of directors of a school district votes not to re-employ a teacher and written notice is given to the teacher on or before April 15 of the board's action, signed by the president and secretary of the board, the teacher is not re-employed for the following school year. No formal order or motion by the school board directing the president and secretary to give written notice to the teacher of the board's action is required.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:ml

PAUPERS: County court may designate county
COUNTY COURT: welfare director as its agent to
DIVISION OF WELFARE: distribute county pauper fund.

FILED
81

November 19, 1952

11/20/52

Honorable Samuel E. Semple
Prosecuting Attorney
Randolph County
Moberly, Missouri

Dear Mr. Semple:

This department is in receipt of your request for an official opinion, which reads as follows:

> "The County Court of Randolph County has been advised by the office of the State Auditor that the payments to the Randolph County Welfare Office for the care of indigent people in this county is improper.
>
> "The County Court in this county has for the past fifteen years paid the money necessary for the care of sick and indigent people to the Randolph County Welfare Office and their agency, in turn, spends this money for the care of these people. A representative of the State Auditor's office advised two members of the County Court recently that such payments for the care of indigent people were not proper where the money was not paid direct but paid to the Welfare Office for them to administer.
>
> "I would like to obtain an opinion from your office as to whether this procedure is improper or not."

Section 207.060, RSMo 1949, provides, in part, as follows:

> "1. The director of welfare shall establish a county office in every county, which shall be in the charge of a county welfare director who shall have been a resident of the state of Missouri for a period of at least five years and whose salary shall be paid from funds appropriated for the division of welfare.
>
> "2. For the purpose of establishing and maintaining county offices, or carrying out any of the duties of the division of welfare, the director of welfare may enter into agreements with any political subdivision of this state, and as a part of such agreement, may accept moneys, services, or quarters as a contribution toward the support and maintenance of such county offices. Any funds so received shall be payable to the state collector of revenue and deposited in the proper special account in the state treasury, and become and be a part of state funds appropriated for the use of the division of welfare."

From your request, and from facts ascertained supplementary thereto, it appears that the County Court of Randolph County does not wish to follow the plan set forth in paragraph 2 of Section 207.060, supra, but rather wishes to designate the county welfare director as the court's agent in the distribution of the pauper fund of the county.

This department, in an opinion rendered by a former Attorney General on November 12, 1934, held that the county court cannot delegate its duty in respect to the care for the poor to any other organization. The basis of that holding was that the statutes had imposed upon the county court the duty to care for the poor and that such duties cannot be delegated. What was said therein sets forth the correct statement of law insofar as the facts therein were concerned.

An officer to whom a discretion is entrusted cannot delegate the exercise thereof. State ex rel. Skrainka Const. Co. v. Reber, 226 Mo. 229, 126 S.W. 397; Matthews v. Alexandria, 68 Mo. 115; 46 C. J. 1033.

Section 205.580, RSMo 1949, provides as follows:

> "Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."

Section 205.610, RSMo 1949, provides:

> "The county court of each county, on the knowledge of the judges of such tribunal, or any of them, or on the information of any magistrate of the county in which any person entitled to the benefit of the provisions of sections 205.580 to 205.760 resides, shall from time to time, and as often and for as long a time as may be necessary, provide, at the expense of the county, for the relief, maintenance and support of such persons."

Under the above provisions the duties are imposed upon the county court to provide, at the expense of the county, for the support of the poor. This is a discretionary duty imposed upon the county court which cannot be delegated under the authorities cited above.

However, it is further the rule in this state that an officer "after he has himself exercised the discretion * * * may, under proper conditions, delegate to another the performance of a ministerial act to evidence the result of his own exercise of the discretion." State ex rel. Skrainka Const. Co. v. Reber, supra.

While under the above rule the duty of providing for the poor of the county is imposed upon the county court, still the carrying out of the ministerial functions of such duty may be delegated to an agent of the county court. Therefore, if the county court desires to designate a county welfare director as its agent in carrying out such functions, then such delegation is proper and legal. The moneys so spent at no time become state moneys, but remain county moneys to be spent under the supervision of the county court by the county welfare director.

Honorable Samuel E. Semple

Conclusion.

It is therefore the opinion of this department that the county court may appoint the county welfare director as its agent in carrying out the ministerial functions relating to the distribution of the pauper fund under the direction of the county court.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CBB:ml
(A.G.O.K.)

MOTOR VEHICLES: Section 302.010, et seq., does not require contractor driving own truck to work to have chauffeur's license.
CHAUFFEUR'S LICENSE:

FILED
82

April 23, 1952 4-24-52

Honorable William Siefert, Representative
6025 Arthur Avenue
St. Louis, Missouri

Dear Sir:

You have requested an opinion of this department, as follows:

> "I would like to have an opinion from you in reference to the new drivers license law.
>
> "People who have bought individual driver's license for a small or pickup truck used in going back and forth to their work and also carrying their own material used in their work are being stopped by the St. Louis Police and required to buy a chauffeurs license also.
>
> "Section 302.010 referring to chauffeurs licenses seems to be for motor vehicles in use for transportation of persons and property and receiving compensation for such service. Is there A SECTION IN THE BILL PERTAINING TO THE individual truck owner to buy a chauffeurs license for his own truck used in connection with his business.
>
> "The small trucks I have reference to are not for hire but only to carry workers and their material to their place of work, for example, a painting contractor driving his own truck."

We have examined the present statutory requirements for chauffeurs licenses and find that Section 302.010, effective January 1, 1952, to be in part, as follows:

> "(1) 'Chauffeur', an operator who operates a motor vehicle in the transportation of persons or property, and who receives compensation for such service in wages, salary, commission or fare; or who as owner or employee operates a motor vehicle carrying passengers or property for hire; or who regularly operates a commercial motor vehicle of another person in the course of, or as an incident to his employment, but whose principal occupation is not the operating of such motor vehicle;"

In paragraph (16) of Section 302.010, an "owner" is defined as follows:

> "'Owner', a person who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this chapter;"

Section 302.020, paragraph (1) of the above "driver's license law" is as follows:

> "302.020. It shall be unlawful for any person to:
>
> "(1) Drive as a chauffeur any vehicle upon any highway in this state unless such person has a valid license as a chauffeur under the provisions of this chapter, or to"

The operation of a motor vehicle owned by the operator thereof does not come within the above definition of a chauffeur. He is not operating a vehicle in the transportation of persons or property for wages, salary, commission or fare. He is not carrying passengers or property for hire. This owner operator

would not be said to come within the third phase of this definition as he is not operating the commercial motor vehicle of another.

CONCLUSION

It is therefore the opinion of this department that a contractor who uses his own motor truck to carry workers and their material to the place of the contract work does not need a chauffeur's license.

Respectfully submitted,

JAMES W. FARIS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JWFab

ELECTIONS:
GENERAL ASSEMBLY:
LEGISLATURE:
SENATE:
STATE SENATE: Only counties comprising old senatorial district entitled to vote in special election for senator to fill vacancy for remainder of term.

August 21, 1952 8-2257

FILED
87

Honorable Forrest Smith
Governor of Missouri
Jefferson City, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department, and reading as follows:

> "The late Senator Frisby was elected from old Senatorial District No. 14 in 1950. His death occurred, you probably know, after the state had been laid off into new senatorial districts, and old District No. 14, together with the two additional counties of Linn and Chariton, now constitutes Senatorial District No. 12.
>
> "I plan to issue a writ of election for the first Tuesday after the first Monday in November to fill the vacancy, so I would appreciate being advised by you of the counties which legally should participate in such election."

Article III, Section 11, of the Constitution of Missouri, provides as follows:

> "The first election of senators and representatives under this Constitution, shall be held at the general election in the year one thousand nine hundred and forty-six when the whole number of representatives and the senators from the districts having even numbers, who shall compose the first class, shall be elected, and two years thereafter the whole number of representatives and the senators from

> districts having odd numbers, who shall compose the second class, shall be elected, and so on at each succeeding general election."

Under the provisions of such section a state senator was elected in November, 1950, from State Senatorial District No. 14 which was comprised of the counties of Worth, Gentry, Harrison, Mercer, Grundy, Putnam and Sullivan. Report of First Senatorial Redistricting Commission, provided for by Article III, Section 7, Constitution of Missouri (Section 22.010, RSMo 1949).

On July 11, 1951, the final report of the State Senatorial Redistricting Commission, appointed under provisions of Article III, Section 8, Constitution of Missouri, after the United States census of 1950 was completed, was filed in the office of the Secretary of State of Missouri. Such report shows that new Senatorial District No. 12 will be composed of the counties of Worth, Gentry, Harrison, Mercer, Grundy, Putnam, Sullivan, Linn and Chariton. The term for which the state senator from the 14th Senatorial District was elected in 1950, of course, was a four year term. The term for which his successor is to be elected, at the election for which you are to issue a writ, will be for the remainder of such term.

We believe it to be clear, therefore, that the election of a state senator to serve out the unexpired term of a senator elected from the 14th District in 1950 can be held only in those counties which constituted such 14th District at the time of the election in 1950.

Since under the provisions of Article III, Section 11, Constitution of Missouri, quoted supra, a state senator was elected in 1950 for a four year term from the 12th Senatorial District, it is obvious that the counties now a part of the new 12th Senatorial District have no right to participate in electing a senator from such 12th Senatorial District because there is now a senator serving from such district. The senator to be elected is one who will finish out the unexpired term of the senator from the 14th Senatorial District and must, of necessity, be elected only by the people who live in such senatorial district as it existed at the time the senator whose term he is to fill out was elected.

Honorable Forrest Smith

CONCLUSION

It is the opinion of this department that a state senator to be elected to fill out the term of a state senator elected from Senatorial District No. 14 in 1950 is to be voted on only by the voters living in the counties which constituted such senatorial district in 1950.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CBB:ml

RIVERS: Change in channel of Missouri river by avulsion does not change former boundary line which was the center of old channel.

BOUNDARIES:

FILED
83

June 10, 1952

6-11-52

Mr. Francis Smith, Chairman
Citizens' Flood Committee
Room No. 309, City Hall
St. Joseph, Missouri

Dear Mr. Smith:

This opinion is given in answer to your recent request reading as follows:

> "The present 1952 Missouri River flood has drastically altered the course of the Missouri River just adjacent to the City of St. Joseph.
>
> Prior to this flood, for many years the Missouri River made a large horseshoe bend to the west, and at the end of the bend returned to its channel adjacent to the city. This situation is, as rather crudely portrayed in the sketch which I have attached to this letter to illustrate the situation. As a result of the flood the river broke through its banks and has carved out a new channel, isolating the area of land generally known as the French Bottoms and so indicated on my accompanying map.
>
> Although we lack official confirmation at the present time, the corps of engineers of the United States Army advise us that they intend to make the new channel official as the channel of the Missouri River, and the river will cut through directly south as illustrated on my map, for a length of 1½ miles in-

> stead of going around the eight miles of bend as it formerly did. If this new cut-through is adopted as the permanent channel of the river, it of course will cause the French Bottoms area on which is located a $6,000,000 municipal airport to be separated from St. Joseph by the river channel.
>
> In the consideration of this matter, Colonel L. J. Lincoln, District Engineer of the United States Corps of Engineers raised a question as to whether or not the cut-off through French Bottoms, if it were officially adopted as the channel of the Missouri River, would alter the Missouri-Kansas state line at this point, or would in effect transfer the land in French Bottoms upon which our municipal airport is located, to the State of Kansas. It was our view here in St. Joseph that no such question would arise, because the sudden severing of this Missouri land by the breaking through of this new channel was such an "avulsion" as would not cause either the title or the jurisdiction of the land to change.
>
> Colonel Lincoln, however, has requested that we procure an opinion from the Attorney General of Missouri on this question and that we be authorized to furnish a copy of such opinion to the United States Corps of Engineers in connection with their proposed plan for the new channel.
>
> I hope I sufficiently describe the factual situation in order to place this question clearly before you. I ask your opinion in behalf of the Citizens' Flood Committee of St. Joseph, Missouri, which is working with the County of Buchanan and the City of St. Joseph to represent the interests of this community on the many problems growing out of this recent flood."

For the purpose of this opinion we assume that the manner in which the Missouri river has cut a new channel was by avulsion and not by a gradual process known as erosion and accretion.

Section 46.060 RSMo 1949, describes the boundaries of Buchanan County in the following language:

Section 46.060 RSMo 1949, describes the boundaries of Buchanan County in the following language:

> "Beginning at a point in the middle of the main channel of the Missouri river, where the prolongation west of the line run and marked by M. M. Hughes, under the act of the general assembly of 1838 and 1839; thence east with said line to the old boundary line of the state; thence north with said line to the point where it is intersected by the subdivisional line between sections twenty-one and twenty-eight of township fifty-eight, range thirty-three, west; thence west with the sub-divisional lines to the middle of the main channel of the Missouri river; thence down said river, in the middle of the main channel thereof, to the place of beginning."

Where a county in Missouri is bounded by a watercourse, its extent is declared in the following language found in Section 46.010 RSMo 1949:

> "Whenever a county is bounded by a watercourse, it shall be construed to be the middle of the main channel thereof; * * * * * * * * * "

In Cooley v. Golden, 52 Mo. App. 229, l.c. 232, we find a history reference to disclose the western boundary of Missouri, in the following language:

> "By the act of congress, approved June 7, 1836, United States Statutes at Large, 34, entitled 'An act to extend the western boundary of the state of Missouri to the Missouri river,' it was provided that, when the Indian title to all the lands lying between the state of Missouri and the Missouri river should be extinguished, the jurisdiction over said lands should be thereby ceded to the state of Missouri. It is to be observed that the act ceded the land between the old state line and the river, and the extension of the boundary was to the river, not to the bank thus making

> the natural watercourse the boundary; and the general rules, construing such words of cession as shown by the adjudged cases, carry that boundary to the center of the channel. Benson v. Morrow, 61 Mo. 345; Jones v. Soulard, 24 How. 41; Howard v. Ingersoll, 13 How. 381; Railroad v. Devereux, 41 Fed. Rep. 14; Missouri v. Iowa, 7 How. 660."

The Supreme Court of Missouri, in the case of State ex inf. Mansur v. Hoffman, 2 S.W. (2d) 582, 318 Mo. 991, decided in 1927, quoted approvingly the following language used by Mr. Justice Brewer, in the case of Nebraska v. Iowa, 143 U. S. 359. We adopt the language of Mr. Justice Brewer as found at 318 Mo. l.c. 995:

> "It is settled law, that when grants of land border on running water, and the banks are changed by that gradual process known as accretion, the riparian owner's boundary line still remains the stream, although during the years by this accretion, the actual area of his possessions may vary. In New Orleans v. United States, 10 Pet. 662, 717, this court said: 'The question is well settled at common law, that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and, as he is without remedy for his loss in this way, he cannot be held accountable for his gain.'
>
> It is equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the centre of the old channel, although no water may be flowing

> therein. This sudden and rapid change of channel is termed, in the law, avulsion. In Gould on Waters, sec. 159, it is said: 'But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates.'
>
> These propositions, which are universally recognized as correct where the boundaries of private property touch on streams are in like manner recognized where the boundaries between states or nations are, by prescription or treaty, found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the centre of the channel. Avulsion has no effect on boundary, but leaves it in the centre of the old channel."

The rule found in State ex inf. Mansur v. Hoffman, supra, is stated in the following language in the case of State of Arkansas v. State of Tennessee, 38 S. Ct. 301: 246 U.S. 158; 62 L. Ed. 638. The following language is found at 38 S. Ct. 301, l.c. 304:

> " * * * * It is settled beyond the possibility of dispute that where running streams are the boundaries between States, the same rule applies as between private proprietors, namely, that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel."

Mr. Francis Smith

CONCLUSION:

Assuming that the recent change in the channel of the Missouri river, forming the western boundary of Missouri, was caused by an avulsion, such change does not alter the former boundary of Missouri, but leaves it in the center of the old channel.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:lw

AGRICULTURE:
LICENSES:

An out-of-state dealer in eggs who maintains no place of business for the sale of same within the state is not required to obtain a license under the provisions of Section 196.335, RSMo 1949; no provision exists for the collection of unpaid license fees for prior years.

October 1, 1952

10-6-52

FILED
85

Honorable Joseph T. Stakes
Director of Dairy Division
Department of Agriculture
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office. Your request reads as follows:

"Missouri is the receiving state for vast quantities of shell eggs being brought into the state from Iowa, Nebraska, Kansas, Oklahoma, Arkansas and Illinois. These eggs-depending upon the season of the year--are sold to egg breaking and processing plants and, also, they find their way into retail channels as shell eggs.

"It is to the interest of the Department of Agriculture as the administrative agency of the Egg Law, as well as to the interest of the consumers of both shell and processed eggs, that these products be subjected to the same inspectional effort as now applies to eggs produced within the state. The Department has experienced considerable difficulty in maintaining quality control of eggs imported into the state by reason of the fact that--to date--those persons engaged in interstate movement of shell eggs have not been licensed.

"Section 196.335 RSMo 1949 reads in part as follows: 'It shall be unlawful for any person, firm, or corporation to buy, sell, trade, or

traffic in eggs in this State without a license with the following exceptions:'. The exceptions following this sentence do not include dealers or haulers who bring eggs into Missouri markets.

"It appears, then, that those persons engaged in the interstate movement of eggs into Missouri do sell, trade, or traffic in eggs in this State.

"In view of the foregoing, an opinion is respectfully requested relating to:

"(1) Would out-of-state dealers referred to herein be required to obtain license to buy, sell, trade, or traffic in eggs in this State?

"(2) In the event individuals referred to in No. 1 above are required to secure a license, would such individuals also be required to pay the license fee retroactive to July 1, 1950--which was the effective enforcement date of the Missouri Egg Law."

Section 196.335, RSMo 1949, to which you refer reads as follows:

"1. It shall be unlawful for any person, firm or corporation to buy, sell, trade or traffic in eggs in this state without a license with the following exceptions:

"(1) Those who sell only eggs produced by their own flock;

"(2) Hatcheries which purchase eggs used exclusively for hatching purposes;

"(3) Hotels, restaurants, and other public eating places where all eggs purchased are served in the establishment;

"(4) Bakeries, confectioneries, and ice cream manufacturers purchasing eggs for use and used only in the manufacture of their products;

"(5) Agents employed and carried on the payroll on a salary basis by licensed dealers.

"2. Each person firm or corporation engaged in buying, selling, trading, or trafficking in eggs, except those listed under subdivisions (1), (2), (3), (4), and (5)

above, shall obtain an annual license for each separate place of business from the commissioner of agriculture. The following types of licenses shall be issued:

"(1) A 'retail distributor's license' shall be required of any person, firm or corporation buying eggs exclusively from persons, firms or corporations that are licensed under this act for the sole purpose of selling such eggs at retail;

"(2) A 'small dealer's license' shall be required of any person, firm or corporation who buys, sells, or traffics in less than four hundred cases (thirty dozen per case) of eggs in any one week. This shall include retailers who also buy eggs from others than persons, firms or corporations licensed under section 196.310 to 196.360.

"(3) A 'large dealer's license' shall be required of any person, firm or corporation who buys, sells or traffics in over four hundred cases (thirty dozen per case) of eggs in any one week. This shall include retailers who also buy eggs from others than persons, firms or corporations licensed under section 196.310 to 196.330.

"(4) A 'processor's license' shall be required of any person, firm or corporation engaged in the business as defined in section 196.330.

"3. The annual license fee shall be:

(1) Retail distributors . . . . . $ 2.00
(2) Small dealers 2.00
(3) Large dealers 15.00
(4) Processors - license fees for processors shall be determined on the basis of cases (thirty dozen per case) of eggs processed in any one day, as follows:

(a) Less than fifty cases . . . . . $ 25.00
(b) More than fifty cases and less than two hundred and fifty cases . 50.00
(c) More than two hundred and fifty cases and less than one thousand cases 75.00
(d) More than one thousand cases . . 100.00

> "4. All licenses shall be conspicuously posted in the place of business to which it applies. The license year shall be twelve months or any fraction thereof beginning July first and ending June thirtieth.
>
> "5. No license shall be transferable, but it may be moved from one place to another by the consent of the commissioner of agriculture."

Reading this provision in connection with other provisions of Chapter 196, discloses that it is not purely a revenue raising measure but has for its purpose the furthering of regulatory measures related to the inspection of eggs for human consumption. Such a legislative enactment is a valid exercise of the police power of the state although it may incidentally affect interstate commerce. The rule is stated in 11 Am. Jur., Section 94, page 85 as follows:

> "The police power of the states was not surrendered when general power to regulate commerce with foreign nations and among the several states was conferred upon Congress. Especially when so exercised as to be an aid to commerce, the states or their municipalities, in the public health, the public morals, the public safety, and the public convenience--that is, they may adopt any legislation or regulation for any of those purposes and relative to interstate or foreign commerce, provided such laws or ordinances are local in their character and affect interstate commerce incidentally only. * * *"

It, of course, admits without question that a state may make such a requirement as the license here involved where it affects only local or intrastate commerce.

A literal reading of Section 196.335 RSMo 1949, indicates that it is limited in its application to the transaction of buying, selling or trading within this state. In other words, the sale would have to be consumated within this state, for the laws of a sovereign state having no extra territorial effect would not affect a sale or trade without the territorial limits, and the legislature is not presumed to have done a futile or meaningless thing.

We do not believe that the terms "traffic" or "trafficking" as used in this section means the mere act of transporting or shipping but is synonymous with the terms buying and selling. See 42 Words and Phrases, page 310, wherein the following definitions are found.

> "'Traffic' is the buying of something from another or the selling of something to another. In re Cameron Town Mut. Fire Lightning & Windstorm Ins. Co., 96 F. 756, 757.
>
> "'Trafficking' imputes the carrying on or engaging in business. People v. Murawski, 68 N.E. 2d 272, 274, 394 Ill. 236.
>
> "'Traffic' means the exchange of goods, wares, or merchandise between individuals, communities, or countries, whether directly by barter or by use of money, bills of exchange, etc.; trade. Mollendorf v. State, 173 P. 2d 519, 522, 67 Idaho 151."

Further indication that said section applies only to persons, firms or corporations actually engaged in doing business within this state is found in paragraph 2 and 4 of Section 196.335. Paragraph 2, provides that a license must be obtained for each separate place of business and paragraph 4 provides that the license must be conspicuously posted in the place of business. It, of course, would be meaningless to require a license for a place of business outside the state. Therefore, if the persons, firms or corporations about which you inquire are present whether by agent or otherwise within the state engaged in buying or trading in eggs they would be required to obtain a license as provided, for it is only under such circumstances that such a license bears a direct relation to the inspection laws and where no such relation exists, such a measure would exist only as an inoperative revenue law void under the commerce clause of the federal constitution.

Your next question deals with the liability of a person, firm or corporation who are subject to the provisions of Section 196.335 for license fees for prior years not collected. Each year's license must be obtained currently and we are unable to find any provision authorizing the collection of license fees for prior years when such were not paid. Therefore, we must conclude that the state cannot require the payment of a license fee for the years 1950 and 1951 where they are not paid.

CONCLUSION

Therefore, it is the opinion of this department that persons, firms or corporations located outside the State of Missouri and who do not maintain a place of business for the sale of eggs within this state but who nevertheless sell or ship such eggs to local processors is not required to obtain a license as provided in Section 196.335, RSMo 1949.

Honorable Joseph T. Stakes

We are further of the opinion that the state has no authority to collect license fees as provided in Section 196.335 for the years 1950 and 1951 where the same were not paid, there being no authorization for such collection.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

OK

J. E. TAYLOR
Attorney General

DDG:hr

COMMISSIONER OF AGRICULTURE:
FOODS AND DRUGS:

Product containing less than 8% milk fats; or one in which milk fats have been substituted by use of non-milk type fats; and product to which such oils have been added to ingredients provided by Sec. 196.850 RSMo 1949, defining ice cream; and manufacture, sale, or offer to sell products as, or for ice cream is illegal, but manufacture, sale or offer to sell product not as or for ice cream not illegal.



November 19, 1952 11-20-V-2

Mr. Joseph T. Stakes
Director of Dairy Division
Department of Agriculture
Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your request for a legal opinion of this department, which reads as follows:

> "Section 196.850 RSMo 1949 defines ice cream as a dairy product and a 'frozen mixture' containing several other named ingredients.
>
> "Section 196.525 RSMo 1949, paragraph 19, defines 'dairy product'.
>
> "Section 196.600 RSMo 1949 makes it unlawful to expose for sale any dairy product containing any foreign substance.
>
> "Section 196.705 RSMo 1949 prohibits the use of oils or fats other than milk fat under the name of said product or articles of the derivatives thereof, or under any fictitious or trade name whatsoever. This paragraph specifically mentions fluid derivatives of several dairy products. In this connection, ice cream should be considered a liquid. All of the ingredients, such as: milk and cream, with the exception, perhaps, of sugar and fruits going into the manufacture of ice cream are liquid.

> "When these ingredients are combined, they form an ice cream mix which is also a liquid. When the ice cream is drawn from the freezer in a semi-frozen nature, it is also in a liquid state.
>
> "The Federal Food and Drug Administration has decreed that ice cream should be stated in terms of measure generally used by consumers to express quantity--conceding, of course, that ice cream shall be treated as a liquid. Therefore it appears that there should be no question but that ice cream should be considered a liquid.
>
> "An opinion is requested as to whether or not: first, the use of fats other than milk fats in the manufacture of ice cream constitutes a violation of existing statutes? Second, would a product containing skim milk, milk solids, sugar, flavorings, and oils other than milk fat--which product would be similar to ice cream--be in violation of existing statutes? Third, if any product explained in paragraphs one and two above were offered for sale--even though the carton containing such products did not state that the product was ice cream--would this act be in violation of existing statutes?"

Reference is made in the opinion request to certain sections of the RSMo 1949, to all of which sections we shall refer in our discussion, with the exception of 196.705. This section makes it unlawful to use fats or oils other than milk fats in the manufacture of any of the dairy products named, or any of the fluid derivatives of any of them, or to sell exchange, or to have any of such fats or oils in one's possession for the purpose of selling or exchanging same.

The dairy product and frozen mixture which another section of the statute defines as ice cream has not been mentioned in Section 196.705, supra, and since it is not wholly a derivative of any of the products specifically named, it is apparent that this section does not apply to the manufacture or sale of ice cream, and for this reason we find it unnecessary to make any further reference to same in our discussion of the questions found in the opinion request.

The first question found in the opinion request is whether or not the use of fats other than milk fats in the manufacture of ice cream constitutes a violation of existing statutes.

For the purposes of our discussion herein we find it practical to limit our consideration of the statutes to Sections 196.850 to 196.890 of that portion of Chapter 196, RSMo 1949, entitled, "Manufacture and Sale of Ice Cream."

The exact meaning of the inquiry is not indicated, and it is difficult to determine whether the writer meant to ask if Section 196.850, (the ice cream definition statute) would be violated if the namufacturer substituted non-milk type fats for milk type fats, or whether this section would be violated if the manufacturer placed all the ingredients required by this statute in his product and then added non-milk type fats. Since the writer may have intended to refer to the alleged violations under either set of circumstances, we shall discuss the matter and give our opinion as to whether said statutes will have been violated under each set of such circumstances.

Section 196.850, supra, gives the definition of ice cream and reads as follows:

> "'Ice cream' is a dairy product and a frozen mixture made of milk and cream or the products thereof; with sugar, stiffeners, flavors or extracts, and with or without certified coloring and containing not less than eight per cent milk fat. Ice cream, as in this section defined, and the various ingredients thereof, shall be free from filth, manure or other harmful or diseased-bearing germs, or any element, ingredient or constituent deleterious to health. The manufacture or sale in this state of ice cream having a milk fat content less than required by sections 196.850 to 196.890, or containing any filth, manure or other harmful or disease-bearing germs, or any element, ingredient or constituent deleterious to health, shall be unlawful."

Your inquiry necessarily calls for a construction of the sections relating to the manufacture and sale of ice cream, particularly Section 196.850 and in attempting to construe said sections certain rules are to be followed, especially the primary rule of statutory construction.

Such primary rule of statutory construction has been given in the case of Wallace v. Woods, 102 S.W. (2d) 91, in which the court said at l. c. 95:

> "'The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible;

> and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and the "manifest purpose of the statute, considered historically," is properly given consideration. * * * 2 Lewis, Sutherland on Stat. Const. (2d Ed.) Sec. 363; Endlich on Interpretation of Statutes, Sec. 329; and Maxwell on Statutes (5th Ed.) 425.'"

The general rule prevailing in most jurisdictions that the state or municipality, when clothed with the necessary statutory authority, may regulate the manufacture and sale of food products has long been held to be the law, and also applies to ice cream. Such general rule has been aptly stated in Am. Jur., Vol. 22, 848-9 to be as follows:

> "A state or municipality, if the latter is clothed with the necessary statutory authority, has the right, without violation of constitutional restrictions, to regulate with reasonable limits the manufacture and sale of ice cream or frozen milk products for the purpose of the prevention of disease or deception of the public and the securing of a wholesome product. An act the title of which recites that it is 'an act relating to food standards' is sufficiently definite to include regulations relating to ice cream. * * *"

From the language used in Section 196.850, supra, it is apparent that it was the intention of the legislature to enact a law giving an exact definition of ice cream. This was not an arbitrary exercise of power on the part of the legislature but a valid exercise of the police power of the state in order to effectuate the purpose of the law. It is also apparent that the purpose of the law was to set up a standard by which all food products known as ice cream were to be measured, and to protect the public from fraud in the manufacture and sale of products which failed to measure up to that standard.

It is noted that it was the intention of the lawmakers to not only provide that a nonconformity to statutes regulating the manufacture and sale of ice cream would be deemed a violation of that law, but that such violations were declared to be misdemeanors, and punishable under the criminal laws.

The only offense specifically provided to be a violation of Section 196.850, supra, is the manufacture or sale in this state of ice cream containing less than 8% milk fat, or containing any

filth, manure or harmful or disease bearing germs, or any element, ingredient or constituent deleterious to health. However, Section 196.885, provides that it shall be unlawful to manufacture, sell or offer for sale any ice cream which does not conform to the standard fixed by Section 196.850. Section 196.885 reads as follows:

> "It shall be unlawful for any person, firm, copartnership, association or corporation to whom or to which sections 196.850 to 196.890 apply, to manufacture, sell or offer for sale in this state any frozen mixture, as, or for, ice cream which does not conform to the standard prescribed in section 196.850."

Section 196.890 provides the penalty that may be inflicted for a violation of any of the provisions of Sections 196.850 to 196.890, supra, and reads as follows:

> "Whoever shall violate any of the provisions of sections 196.850 to 196.890 shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be punished by imprisonment in the county jail for a period of not exceeding thirty days, or by a fine of not less than twenty-five dollars nor more than three hundred dollars, or by both such fine and imprisonment."

For the reasons given above we repeat that it was the apparent intention of the legislature in the enactment of Section 196.850, supra, to give an exact definition of ice cream and to set a standard for the manufacture and sale of ice cream. This being true, it follows as a matter of course when the provisions of this law are applied to individual cases, that any product manufactured and sold, or offered for sale as or for ice cream which does not contain the ingredients specified by the statute, or otherwise fails to comply with the standard fixed by the statutory definition is not ice cream, regardless of how nutritious or valuable it may be as a human food, and that the manufacture, sale, offering for sale as or for ice cream of such a product is unlawful.

In order to sustain our position as given in the preceding paragraph, we call attention to the case of United States v. 62 Cases More Or Less, Six Jars of Jam, etc., 183 Fed. 2d 1014. In this case it was held that the jam in question which failed to comply with certain provisions of the Federal Food, Drug and Cosmetic Act, defining fruit jam, could not be legally represented to be, or to be used as fruit jam, nor could it be legally sold as fruit jam.

At. l.c. 1017-1018, the court said:

> "It is significant that Congress in Section 343(g), in dealing with misbranding by failure

to conform to the definition and standard of identity, did not permit departure from the standard if the label disclosed that the food did not conform to the standard, whereas in Section 343(h) (1) (2), in dealing with misbranding by failure to conform to standard of quality and standards of fill of container, Congress permitted departure from the standard if the label on the food set forth, in the manner and form specified in the regulation, a statement that it fell below the standard, thus indicating a Congressional intent to permit departure from standards of quality and fill of container, where such departure was shown by truthful labeling, but not to permit a departure from a definition and standard of identity, even though such departure was disclosed by the label.

"Whether a food purports to be, or is represented to be, a food for which a definition and a standard of identity has been prescribed by regulation, is not to be determined solely from obscure disclosures on the label. If it is sold under a name of a food for which a definition and standard has been prescribed, if it looks and tastes like such a food, if it is bought, sold and ordered as such a food, and if it is served to customers as such a food, then it purports to be, and is represented to be, such a food.

"We conclude that the jams under seizure purported to be, and were represented to be, fruit jams, for which a definition and standard of identity had been promulgated; that they did not conform to the definition and standard of identity, and that the manufacturer could not escape the impact of Section 341 and Section 343(g) by labeling them imitations of jams and by truthfully setting forth on the label the proportions of sugar, fruit and other ingredients contained therein.

"It is urged that the effect of our discussion will be to compel the manufacturer of these jams to take such product off the market and to deprive persons of modest means of an inexpensive and wholesome food product; and that the portion of the Senate Committee Report set forth in Note 6, infra, shows the Congress did not intend the operation of Section 343(g) to

> produce such results. But the results envisioned will not necessarily follow. The manufacturer may market the product as syrup and fruit thickened with pectin, or syrup flavored with fruit and thickened with pectin, but the product may not be lawfully sold or served to customers under the name of fruit jam and in such a manner that it purports to be, or is represented to be fruit jam."
>
> (Underscoring ours.)

Again in this connection we call attention to the case of Dairy Queen of Wisconsin v. McDowell, 51 N.W. 2d 34. From the statement of facts given in this case, it was sought by the Department of Agriculture to stop the sale of a semi-frozen food product similar to ice cream but containing less butter fat than ice cream, on the ground that the public needed to be protected. The product was a healthful nutritive food, and was not offered for sale as ice cream, and the court held that the public needed no protection under such circumstances, and that the sale of the product could not be stopped.

At. l. c. 37, the court said:

> "It is contended that Dairy Queen is an imitation ice cream in that it resembles ice cream in taste, texture and consistency. Appellant does not concede this, but even if it were so, a resemblance to ice cream does not make the product an imitation. There is no artificiality employed in producing Dairy Queen. Its ingredients are the same natural ingredients contained in ice cream, but in different proportions. We can see where imitation and adulteration may be present and fraud perpetrated upon the public where; as in Carolene Products Co. v. United States, 1944, 323 U. S. 18, 65 S. Ct. 1, 89 L. Ed. 15, abstracted butter fat is replaced with vegetable oil; and where, as in Day-Bergwall Co. v. State, 1926, 190 Wis. 8, 207 N.W. 959, the product was admittedly an artificial vanilla. * * *"
>
> "According to the stipulation, Dairy Queen will not be sold as ice cream. Whatever resemblance it may have to ice cream, therefore, cannot mislead the public in buying it.
>
> "Respondent argues that in removing some of the butter fat, which is the more expensive ingredient,

> and adding more of the cheaper non-fat solids, the appellant manufactures and inexpensive product which would tempt retailers to pass if off as ice cream. This so-called substitution has no effect upon the wholesomeness or nutritious properties of the product, and is not sufficient reason to bar it, especially in view of the authority granted to the respondent by ch. 93, Stats., to regulate its manufacture and sale.
>
> "Under ch. 93, Stats., the department of agriculture has the power to establish standards for food products and to prescribe regulations governing marks and tags upon such products. Those standards shall not affect the right of any person to dispose of a food product not conforming to the standards, sec. 93.09(4), Stats., 'but such person may be required to mark or tag such product, in such a manner as the department may direct, to indicate that it is not intended to be marketed as of a grade contained in the standard and to show any other fact regarding which marking or tagging may be required under this section.' The purpose is clear. The legislature does not intend to deny any person the right to make and sell a food product so long as its consumption does not endanger public health and welfare. It does intend, however, to so regulate its sale that the public is not subjected to the injury of buying a product different from that which is intended to be bought. See City of New Orleans v. Toca, 1917, 141 La. 551, 75 So. 238, L.R.A. 1917E, 761.
>
> * * * * * * * * * * *
>
> "It is our conclusion that the general welfare does not require prohibition of the manufacture and sale of the product here in question, the power of regulation being sufficient to prevent any fraud upon the consuming public." ''
>
> (Underscoring ours.)

Therefore, in answer to your first inquiry, it is our thought that if ice cream were manufactured, sold, or offered for sale which contained less than 8% milk fats, or if it contained manure or other harmful or disease-bearing germs, or any element, ingredient, constitutent deleterious to health, then the provisions of Section 196. 850, will have been violated, since all of such actions are expressly

prohibited by this section. If the product were sold or offered for sale as ice cream, this would also constitute a violation of Section 196.885, supra.

In the event the product contained every ingredient required by Section 196.850, which defines ice cream, and non-milk type fats were added, it is our further thought that the product would not be ice cream. While it might be as highly nutritive a human food as ice cream it would not comply with the definition and standard provided by the statute, and consequently would not be ice cream.

None of the provisions of Sections 196.850 to 196.890, relating to the manufacture and sale of ice cream prohibit the manufacture and sale of a frozen mixture and food product similar to ice cream, but which does not comply with Section 196.850, supra. However, if such food product is manufactured, sold or offered for sale as or for ice cream, then the provisions of Sections 196.850 and 196.885, will have been violated.

We find it unnecessary to discuss the second and third inquiries of the opinion request for the reason that said inquiries have been fully answered above in our discussion of the first inquiry.

CONCLUSION

It is therefore the opinion of this department that a product containing less than 8% milk fats, or one in which the milk fats have been substituted by use of oils containing no milk type fats; or a product to which such oils have been added to the ingredients provided by Sec. 196.850, RSMo 1949, defining ice cream, is not ice cream within the meaning of the section. The manufacture, sale, or offer to sell such product, as or for ice cream is a violation of Section 196.850 and 196.885, RSMo 1949. However, if the product is not manufactured, sold or offered for sale as or for ice cream, said statutes will not be violated.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PNC:hr

COMMISSIONERS OF
AGRICULTURE: Manufacture and sale of a frozen food
FOOD AND DRUGS : product which contains vegetable fat
does not violate provisions of Section
196.705, RSMo 1949.



November 21, 1952

11-21-52

Mr. Joseph T. Stakes
Director, Dairy Division
Department of Agriculture
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion which reads:

> "Section 196.850, RSMo 1949, defines ice cream as a dairy product and a frozen mixture containing several other main ingredients. Section 196.705 RSMo 1949 prohibits the use of oils or fats other than milk fat under the name of said product or article of the derivatives thereof or under any fictitious or trade name whatsoever.
>
> "This paragraph, it appears, prohibits the combination of vegetable oils with milk solids. Attached hereto is a carton being used to package a frozen food product which contains vegetable fat. It is to be noted that this carton is of the type that is traditionally used to package ice cream in. Also, it has printed thereon several cuts which imply that the frozen mixture is being merchandised as or in the semblance of ice cream. There is the traditional ice cream cone, ice cream soda, ice cream sundae, and the slice of pie which has on it a portion of ice cream.
>
> "Also, it is to be noted it states on the carton that the frozen mixture is not an ice cream. The ingredients contained in this

product are claimed to be: milk solids, sugar, stabilizer, vegetable fat, and certified color.

"An opinion is requested as to whether or not: first, the use of a vegetable oil in combination with milk solids constitutes a violation of Statute 196.705 RSMo 1949; second, is the merchandising of this frozen mixture in violation of Section 196.885 RSMo 1949 in view of the fact that it is a frozen mixture and does not conform to the standards of ice cream. Also, in view of the illustrations used to merchandise the product, notwithstanding the fact that the words 'not an ice cream' are contained on the carton. Third, would the wording 'not an ice cream' relieve the manufacturer of this product of his responsibilities even though he might merchandise the product as a frozen mixture and in the semblance of ice cream?

"If the intent of Section 196.705 RSMo 1949 was not to prohibit the combining of vegetable fats with milk products--and if the wording of this Statute is not such as to prohibit the same--it would seem that manufacturers could legitimately use vegetable oils in combination with other milk solids as found in such products as cheese or butter.

"Information is available that points out the favorable nutritive value of milk fat as compared to other fats of vegetable origin."

Your opinion request relates principally to the frozen food product which contains vegetable fat, so our opinion shall particularly apply to whether this product comports with the laws of Missouri relating to the manufacture and sale of such product.

You ask three questions and we shall answer them in the order stated in your request.

First, you inquire if the use of a vegetable oil in combination with milk solids constitutes a violation of Section 196.705, RSMo 1949. That section reads:

> "It shall be unlawful for any person, firm or corporation, by himself or itself, his or its agent or servant, or as the servant or as agent of another to manufacture, sell or exchange, or have in possession with the intent to sell or exchange, any milk, cream, emulsified cream, skim milk, buttermilk, condensed or evaporated milk, powdered milk, condensed skim milk, or any of the fluid derivatives thereof, or any of them, to which has been added any fat or oil other than milk fat, either under the name of said product or articles of the derivatives thereof, or under any fictitious or trade name whatsoever."

For the sake of this opinion, we shall assume that the ingredients shown on the carton enclosed with your request are correct. It shows thereon that the product contains milk solids, sugar, stabilizer, vegetable fat and certified coloring. The foregoing statute prohibits the manufacture, sale or exchange or possession with intent to manufacture, sell or exchange any milk, cream, condensed or evaporated milk, skim milk or any of the fluid derivatives thereof, to which is added any fat or oil other than milk fat, either under the name of the product or articles of the derivative thereof. It would be unlawful to manufacture and sell said product if this product can be classified as a derivative of milk. The company further admits that the product does contain milk solids. In answering your request, it is essential to determine what milk is and its contents. To do this, it is essential that we refer to some recognized authority, and we cite the text of "Milk and Its Products" by H. H. Wing, Chapter 2, which sets out the composition of milk and reads in part:

> "The constituents of milk are numerous and of diverse character, but may be easily classified into a few well marked groups as follows: (a) water, (b) fats, (c) substances containing nitrogen (albuminoids), (d) sugar, (e) ash. Excepting the water, they are collectively known as milk solids. The solids exist partly in solution, partly in semi-solution, and partly in suspension in the water. Milk from the various classes of animals has the same general constitution and properties, and

> varies only in the relative proportions of the various proximate constituents. Cow's milk is typical of all milks, and as it is the only milk used in processes of manufacture in the United States, all of our discussions have reference to it alone. * * * "

Webster's International Dictionary has defined "derivative" as follows:

> "1. One that is derived; anything obtained or deduced from another.
>
> "2. Chem. A substance so related to another substance by modification or partial substitution as to be regarded as theoretically derived from it, even when not obtainable from it in practice; thus, the amino compounds are derivatives of ammonia."

Also, the appellate courts have to a great extent followed this definition. In State v. Wong Fong, 241 P. 1072, 75 Mont. 81, the court defined the word "derivative" as that which is derived, anything obtained or deduced from another, as alkalied from cocoa leaves, is a derivative from cocoa leaves.

The primary rule of construction of statutes is to ascertain and give effect to lawmakers' intent and this should be done from words used, if possible, considering the language honestly and faithfully. See City of St. Louis v. Senter Commission Company, 85 S.W.2d 21, 337 Mo. 238.

While it is true ice cream is measured as a liquid and often milk solids are considered fluids, in view of the above we must hold that in the manufacturing of this product, Section 196.705, RSMo 1949, is not violated.

You next inquire if the merchandising of this frozen mixture is in violation of Section 196.885, RSMo 1949, which reads:

> "It shall be unlawful for any person, firm, copartnership, association or corporation to whom or to which sections 196.850 to 196.890 apply, to manufacture, sell or offer for sale in this state any frozen mixture, as, or for, ice cream which does not conform to the standard prescribed in section 196.850."

The foregoing statute requires anyone before manufacturing

ice cream to obtain a permit from the Commissioner of Agriculture. To answer the question, we must determine if the product is an ice cream. While the carton that contains this product specifically states that it is not an ice cream, it is well established that the mere statement to that effect is not of itself sufficient if the actual ingredients, under the law, show it to be ice cream. In other words, we must look to the contents of the produce itself to actually determine if it is ice cream and not just take for granted the statement of the manufacturer. If the Commissioner of Agriculture is required to not look beyond such statements of manufacturers as to what their products contain, it is easy to see that it would not be difficult to flount the law. Again assuming for the sake of this opinion, as we have no other way presently of determining the actual contents of this product, that it contains the ingredients shown on the carton, it is conceded that this is a frozen product containing milk solids which is, at least as shown above, a part of milk, however not a derivative of milk. It also contains sugar and certified coloring which, under the law, are parts comprising ice cream. However, it does not show any stiffeners unless that is the same as a stabilizer; furthermore, it does not contain milk fat, but does contain vegetable fat. So, these last two items are missing, and, therefore, the product cannot be declared an ice cream for the reason that it does not contain all of the ingredients as required under Section 196.850, supra. So, we must hold that it is not an ice cream as defined by the statutes.

We think it unnecessary to answer your last question as we have covered that matter hereinabove.

CONCLUSION

Therefore, it is the opinion of this department that the use of vegetable oil in the manufacture of a frozen food product is not a violation of Section 196.705, RSMo 1949; that the merchandising of such frozen food product is not in violation of Section 196.885, RSMo 1949, which provides that anyone manufacturing or selling ice cream must first obtain a permit, since this product is not an ice cream; that the mere statement on a carton by the manufacturer that the product is not an ice cream does not relieve the manufacturer of said product of his responsibility under the law if in fact the product is actually an ice cream.

Respectfully submitted,

APPROVED:

J. E. TAYLOR
Attorney General

AUBREY R. HAMMETT, JR.
Assistant Attorney General

ARH:VLM:lrt

AGRICULTURE)
) Section 266.270, RSMo 1949, prohibits
) the mixture of feed with materials ap-
SCREENINGS - DEFINITIONS:) pearing in the proposed definition of
) "Chaff and/or Dust."

1-25-52

January 25, 1952

FILED
86

Mr. A. Earl Straub
Director, Feed Division
Department of Agriculture
Jefferson City, Missouri

Dear Sir:

This is in reply to your request for an opinion of this department. Your request is as follows:

> "For the purpose of promoting uniformity in the definitions of commercial feeding-stuffs among the several states, we propose to revise that part of the regulation pertaining to the definition of Screenings of the Missouri State Feed Law.
>
> "The third and last proposed definition is as follows:
>
> "Chaff and/or Dust is material that is separated from grains or seeds in the usual commercial cleaning processes. It may include hulls, joints, straw, mill or elevator dust, sweepings, sand, dirt, grains, seeds. It shall be labeled 'Chaff and/or Dust.' If it contains more than 15% ash the words 'sand' and 'dirt' shall appear on the label.
>
> "The question arises as to the validity of including this definition as a part of our official definitions for Screenings (Section 14329, R. S. Missouri, 1939). May we have an opinion from your office?"

We note from your request that it is your intention to revise that part of the regulation pertaining to the definition of Screenings of the Missouri State Feed Law. We assume that you are attempting to accomplish this by virtue of the provisions of Section 266.-260, RSMo 1949, which section is as follows:

> "The commissioner is hereby empowered to prescribe and enforce such rules and regulations as may be necessary for the enforcement of sections 266.150 to 266.280."

The laws relating to commercial feeding stuffs, under which your query falls, is a division or part of the laws which create and regulate the Missouri State Department of Agriculture. The Department of Agriculture is an administrative agency of the state government created by the legislature of the state for the purpose of carrying out the legislative policy relating to agriculture. Administrative agencies have no power other than that which is expressly granted by the legislature. The Agricultural Department, being an administrative agency created by the Legislature, cannot possess any power to adopt a rule or definition which would result in nullifying the express will of the legislature.

On this subject we refer you to the case of State ex rel. Springfield Warehouse & Transfer Co. et al. v. Public Service Commission, 225 S.W. (2d) 792, l.c. 794, wherein the Springfield Court of Appeals said:

> "However, the adoption of such a rule by respondent (Public Service Commission) can only be legally authorized upon the grounds that the Legislature has directly, or by necessary or reasonable implication, authorized the same. Respondent has no power except that granted by its creator. Missouri Valley Realty Company v. Cupples Station Light, Heat & Power Company, Mo. Sup., 199 S.W. 151, loc. cit. 153; Ex parte Williams, 345 Mo. 1121, 139 S.W. 2d 485, loc. cit. 491.

> "The Legislature has declared the public policy of this state, regarding the transfer of certificates. Respondent is merely the instrumentality of the Legislature, created for the purpose of carrying out that policy. It has no power to adopt a rule, or follow a practice, which results in nullifying the expressed will of the Legislature. It cannot, under the theory of 'construction' of a statute, proceed in a manner contrary to the plain terms of the statute; * * *"
>
> (Parenthetical words and Underscoring ours.)

Section 14329, R. S. Mo. 1939, referred to in your request, is now Section 266.270, RSMo 1949, and in part is as follows:

> "3. Any person who shall mix or adulterate any feed with rice hulls, chaff, peanut hulls, dirt, ground or crushed corncobs, sawdust, weed seeds, the viability of which has not been destroyed except in poultry feeds or with more than five per cent of mineral substances with the exception that this five per cent limitation shall not apply to mineral feeds, or who shall mix or adulterate any feed with materials of little or no feeding value, or with substances injurious to the health of domestic animals or poultry, or who shall sell, offer or expose for sale or distribution any feed so mixed or adulterated shall be guilty of a violation of sections 266.150 to 266.280."

We are unable to find any authorities covering your request. We are, therefore, forced to resort to a construction of the statute last above quoted. This section prohibits any person from mixing or adulterating any feed with rice hulls, chaff, peanut hulls, dirt, ground or crushed corncobs, sawdust, weed seeds, etc., * * * and also

prohibits the mixing or adulterating of any feed with materials of little or no feeding value or with substances injurious to the health of domestic animals or poultry, or the sale, offering or exposing for sale or distribution of any feed so mixed or adulterated. Section 266.280, RSMo 1949, provides that any person violating the provisions of said Section 266.270 shall be deemed guilty of a misdemeanor.

Your proposed definition No. 3 of "Chaff and/or Dust", set out in your request, contains a number of materials expressly prohibited by said Section 266.270, among which are the following: chaff, hulls, dust and dirt, and a number of other materials which could have little or no feed value.

It is, therefore, our opinion that the proposed definition No. 3 of "Chaff and/or Dust" be not included in your new definitions of screenings in Missouri.

CONCLUSION

It is, therefore, the conclusion of this department that Section 266.270, RSMo 1949, prohibits the mixture of materials appearing in the proposed definition of "Chaff and/or Dust" and should not be included in your new definitions of screenings for Missouri.

Respectfully submitted,

GROVER C. HUSTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GCH/fh

SCHOOLS:
PUBLIC SCHOOL RETIREMENT SYSTEM: Teacher who continues to teach after attaining compulsory retirement age is entitled to receive retirement allowance upon separation from active teaching service.

August 18, 1952

Filed: 86

Mr. A. P. Stone, Jr.
Attorney at Law
Woodruff Building
Springfield 4, Missouri

FILED
86

Dear Sir:

Your letter at hand requesting an opinion of this department in behalf of the Board of Regents of the Southwest Missouri State College which, in part reads:

> "At its meeting on June 24, 1952, the Board of Regents of Southwest Missouri State College directed that I request, on behalf of the Board of Regents, that your office render an opinion upon the following question:
>
> 'If a teacher who has reached the age of mandatory retirement should continue to teach full-time or part-time in a district covered by the Retirement System, would such teaching service, together with remuneration received therefor, and the non-payment of contributions for such period of service, prevent the teacher from receiving, at the close of such period of service and upon cessation of remuneration therefor, benefits from the system at the same rate available upon attainment of the age of mandatory retirement?'"

Under the provisions of Section 169.010 (1) (6), RSMo, 1949, the Public School Retirement System is as contained in Sections 169.010 through 169.130, RSMo, 1949, is made applicable to teachers employed by state colleges.

In considering the question you have presented we do not undertake to rule on the propriety or legality of a teacher who has reached the compulsory retirement age of seventy years continuing thereafter in the teaching service.

Mr. A. P. Stone, Jr.

In our opinion submitted to the Executive Secretary of the Public School Retirement System under date of May 29, 1952, we did conclude that a member of the Retirement System who has reached the compulsory retirement age of seventy years was automatically retired and would not be eligible to receive a retirement allowance during the period in which he may continue to teach, either on a full-time or a part-time basis, as we defined those terms in the opinion, after being retired. In short, a teacher who has reached the compulsory retirement age cannot continue to teach and at the same time receive a retirement allowance during the period he teaches.

However, you inquire if a teacher who has reached the compulsory age and continues teaching would be entitled to receive a retirement allowance after his extended teaching service was terminated.

As pointed out in the opinion referred to above, the Public School Retirement System was created for the purpose of providing a retirement allowance for public school teachers coming within the purview of the act. It is so provided in Section 169.020 (1), RSMo 1949. The funds for the operation of the Retirement System are derived from contributions made in equal amounts by the members and their employers. Section 169.030, RSMo 1949.

The retirement allowance as provided for by our Missouri laws is distinguishable from a pension with different rights attached thereto.

In the case of Retirement Board of Allegheny County v. McGovern, 316 Pa. 161, 174 A. 400, the Supreme Court of Pennsylvania was considering a county employee's retirement law. In distinguishing between retirement pay and pension the Court said at Atlantic l.c. 404, 405:

> "Pensions should not be confused with retired pay. A pension is a bounty or a gratuity given for services that were rendered in the past. This act provides for retirement pay. Retirement pay is defined as 'adjusted compensation' presently earned, which, with contributions from employees, is payable in the future. The compensation is earned in the present, payable in the future to an employee, provided he possesses the qualifications required by the act, and complies with the terms, conditions, and regulations imposed on the receipt of retirement pay.
>
> "Until an employee has earned his retirement pay, or until the time arrives when he may retire, his retirement pay is but an inchoate right; but when the conditions are satisfied, at that time retirement pay becomes a vested right of which the person entitled thereto cannot be deprived; it has

Mr. A. P. Stone, Jr.

ripened into a full contractual obligation. * * *

"The distinction between pension and retirement pay is not artificial. The government and municipalities are interested in the faithful and effective discharge of duty by public servants, and a fund judiciously administered is an effective way to secure service of the highest type. Where an allowance is made out of hand, gratuitously, and purely for past services, by the government, it is a pension, with all the attributes of a pension; but where the employee contributes a part of his salary or wages with a sum from the state or county under a quasi contractual relationship with the municipality or state, creating a contributed reserve retirement system, the results are different, retirement pay made therefrom is not a pension; the contributions by the government from their very nature must be viewed in a different light."

In State ex rel. Stringer v. Lee 147, Florida 37 to Southern (2d) 127, the Supreme Court of Florida while determining the right to retirement pay under a law providing for the retirement of circuit judges, said at Southern l.c. 132, 133:

"The weight of authorities is to the effect that when a government by statute once establishes a compensation or retirement system for its said officers or employees and provides in part the funds and means for administering it according to the terms thereof, and any such officer or employee contributes money over a period of years and the contributions are placed to the credit thereof and the officer or employee has served the public or government for the designated period of years, or while serving attains a certain age or becomes mentally or physically disabled while so serving, and when the conditions arise or occur upon which by the rules and regulations of the system the said officers or employees become eligible for retirement and to receive funds to be paid out of said compensation retirement fund and the said officers or employees having met all the requirements of the act creating the retirement system, then the said officers or employees have acquired a vested right under the terms of said statute which establishes a contractual relation which may not be affected or adversely altered by subsequent enactments."

Mr. A. P. Stone, Jr.

In Crawford v. Teachers' Retirement Association 104 Ore. 77, 99 P. (2d) 729, the Supreme Court of Oregon in determining a teacher's rights to retirement benefits provided for under Oregon law creating a Public School Retirement System said at P. l.c. 733:

> "In our opinion, when, under the plan authorized by the statute, plaintiff voluntarily contributed a substantial part of her salary to this fund, contractual relations with the association were created. Prior to the time of her retirement and the completion of her payments, her rights in the fund were of an inchoate nature and were subject to any changes in the by-laws necessary for the betterment of the association. However, when there had been full performance on the part of the plaintiff, in compliance with the by-laws then governing the association, her rights became vested and no subsequent change in the by-laws could interfere with or impair such rights. Any other rule would utterly destroy all stability and security in the retirement fund plan under consideration."

For a complete discussion of the cases on this subject see the Annotation in 137 ALR 249, 255c.

On the basis of the above cases it would appear that teachers under our retirement system are entitled to receive their retirement allowance when all of the conditions of eligibility have been met, and when all requirements have been complied with they acquire a vested right in said allowance.

Therefore, in the situation which you have presented, if a teacher upon application for retirement allowance establishes certain creditable service, shows that all contributions have been paid, has attained the age of seventy years and has separated or withdrawn from active teaching service it is our thought that the qualifications for eligibility have been met; and that said teacher has a vested right to receive his retirement allowance as computed according to law.

In reading the statutes creating the Public School Retirement System of Missouri and providing for the payment of retirement allowances we find no provision in the law that would deny a teacher his retirement allowance who had reached the compulsory retirement age and had complied with the conditions of eligibility. Nor do we find any statutory provision requiring a teacher to apply for his retirement allowance at any certain time, once becoming eligible.

Further, it would appear that the Legislature has clearly manifested an intent that a teacher is entitled to a retirement allowance for life during the period of retirement. This Section 169.010 (10) reads:

> "'Retirement allowance' shall mean a monthly payment for life, during retirement."

CONCLUSION

It is therefore the opinion of this department that a teacher who has reached the age of mandatory retirement, and continues to teach either full-time or part-time would be entitled to receive his retirement allowance at the close of the period of extended teaching service and upon cessation of remuneration therefor at the rate available upon attainment of the age of mandatory retirement.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

STATE INCOME TAX:
PROFITS FROM SALE OF BREEDING CATTLE:
VALUATION:

Director of revenue lacks power under Section 143.200, RSMo 1949, to make regulation that profits of individual taxpayer, from sale of breeding stock or dairy ~~cattle~~ is to be assessed at full value unless owned 12 months prior to sale.

December 18, 1952

FILED
88

12-31-52

Honorable Cecil T. Taylor
County Representative
Shelby County
Shelbyville, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which request reads in part as follows:

> "I would like to have, at your earliest convenience, your official opinion on the following matter.
>
> "Mr. T. R. Allen, Supervisor of the Income Tax Division of the Dept. of Revenue, has recently ruled that the profit on breeding stock or dairy stock, when owned and sold as Capital Investment, is taxable at 100% unless it is owned 12 months or more."

As we understand the facts, a ruling has been made by the director of revenue to the effect that the profits realized from the sale of breeding cattle for stock or dairy purposes shall be assessed at full value for state income tax purposes, unless the taxpayer has owned the breeding cattle for a minimum period of twelve months prior to the sale.

Your objection to the rule is that it nullifies certain sections of the statutes, and you cite us to Sections 143.100 and 143.200 RSMo 1949. It is claimed that the director of revenue relies on the latter section as his legal authority for making the ruling here in question.

While the opinion request does not expressly so state, we assume that the particular inquiry for which such request is made is whether

or not, under the above mentioned circumstances, the director of revenue has been granted the power by Section 143.200 to make such ruling.

The opinion request fails to state whether the ruling, was meant to apply to the individual citizen or resident taxpayer, but for the purposes of our discussion we shall assume that the inquiry was meant to refer to individual citizens or resident taxpayers, and we call attention to Section 143.010, RSMo 1949, relating to this class of taxpayers. Said section reads in part as follows:

> "1. Every individual, a citizen or resident of this state, shall pay a tax upon net income received from all sources during the preceding year in excess of the exemptions herein provided."
>
> (Underscoring ours.)

It is noted that the tax is based upon net income only, and that Section 143.100, RSMo 1949, defines net income and reads in part as follows:

> "1. Income shall include gains, profits, and earnings derived from salaries, wages or compensation for personal services of whatever kind and in whatever form paid; and from professions, vocations, businesses, trade, commerce, or sales or dealings in property, whether real or personal, growing out of the ownership or the use of any interest in real or personal property. In any case where real or personal property has been held for more than six months only fifty per cent of the gain or loss resulting from sale or exchange shall be taken into account in computing net income, but in such cases any loss used in computing the net income shall not exceed one thousand dollars over and above gains for the same period."
>
> (Underscoring ours.)

Section 143.200, supra, reads as follows:

> "The director of revenue may prescribe reasonable rules and regulations for administration of the provisions of the laws relating to the levy, assessment, collection and payment of taxes based on incomes. Such rules and regulations

> shall follow as nearly as practicable the rules and regulations prescribed by the United States government on income tax assessments and collections."
>
> (Underscoring ours.)

Ordinarily a public officer may be legally granted the power by the legislature to make reasonable rules and regulations relating to the duties of his office, so long as such rules or regulations do not contravene the express provisions of any statutes. In this respect it appears that the general rule has been stated in Volume 67, page 370, C. J. S., which reads as follows:

> "Under some statutes an officer has express authority to make rules and regulations, and usually he has implied authority to adopt such reasonable rules and regulations as are necessary to the due and efficient exercise of the powers expressly granted. In order to be valid, a rule or regulation must be reasonable, and in accordance with, subordinate to, and not in conflict with, statutory provisions. The validity of a regulation may also depend on the performance of certain preliminary conditions.
>
> * * * * * * * * * * * * * * * *
>
> "Powers conferred on a public officer can be exercised only in the manner, and under the circumstances, prescribed by law, and any attempted exercise thereof in any other manner or under different circumstances is a nullity. * * *"

Section 143.200, supra, empowers the director of revenue to make reasonable rules and regulations only "for administration of the provisions of the laws relating to the levy, assessment, collection and payment of taxes on incomes * * *."

From the language used in this section it is obvious that the intention of the legislature was that the rule making power of the director of revenue should be confined to the subject matter specifically provided, or that necessarily implied therefrom, and that such rules are limited to those of procedure for the administration and enforcement of the income tax laws. The standard for any rules or regulations made by the director of revenue is provided by this section, and any rules which fail to meet the standard thus fixed are a nullity.

We are unable to find any Missouri decisions in point on the rule making power of public officials, and particularly those of the director of revenue under above mentioned circumstances, consequently, we must look to the decisions of the courts of other states for authority. We here call attention to the case of Duncan v. A. R. Krull Co., 114 Pac. 2d 888, in which the court said at l.c. 889:

> "Rules and regulations by an administrative or executive officer or body are always subordinate to the terms of the statute and in aid of the enforcement of its provisions."

In the opinion of this case the court quoted from 11 Am. Jur., 955, Sec. 240, as follows:

> "The general principle governing the conditions under which the power to make rules and regulations may be delegated has been stated as follows: A legislature, in enacting a law complete in itself and designed to accomplish the regulation of particular matters falling within its jurisdiction, may expressly authorize an administrative commission, within definite valid limits, to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. So long as a policy is laid down and a standard is established by a statute, no unconstitutional delegation of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply."

(Underscoring ours.)

It is our thought that the regulation of the director of revenue here in question is not a reasonable rule or regulation promulgated for the purpose of enforcing the income tax laws of Missouri, within the meaning of Section 143.200, supra. The regulation fails to measure up to the standard provided by this section, in that it does not fall within the limits of those matters upon which the officer has been empowered to make regulations. Instead of purely procedural matters for the administration of the income tax laws, to which the officer's rule making power is limited, it is apparent that the regulation goes far beyond such limitation and attempts to provide a new method for the valuation of profits realized from the sale of livestock held for breeding or dairy purposes, and that the regulation contravenes the provisions of Sections 143.100 and 143.200, supra, particularly that portion of the former section quoted and

underscored above. It further appears that such ruling ignores the term "net income," and attempts to place a value on the profits referred to in excess of those provided by Section 143.010 and 143.100, supra.

Lacking the power under Section 143.200, supra, to make the regulation, said regulation of the director of revenue is a nullity.

CONCLUSION

It is, therefore, the opinion of this department that the director of revenue lacks the power, under Section 143.200, RSMo 1949, to make a regulation that the profits realized by an individual taxpayer from the sale of breeding stock or dairy stock shall, for the state income tax purposes, be assessed at full value unless said stock was owned for a period of twelve months prior to the sale.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PNC:hr

CIRCUIT CLERKS,)
)
FEES:)

Clerk of the circuit court may demand payment in advance for certified copies of records in his office.

FILED
89

January 14, 1952

1-15-52

Mr. B. C. Tomlinson
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Mr. Tomlinson:

We have given careful consideration to your request for an opinion, which request is as follows:

> "The Circuit Clerk is continually getting requests from inmates of the penitentiary for certified copies of the complaint, warrant, information, and sentence and judgment in their criminal cases and no money is sent to cover the costs to the clerk for preparing same and none is sent the clerk when he prepares these documents and incloses his bill. Is the Circuit Clerk obliged to prepare these documents free of charge and can he demand payment for same in advance before he goes to all the trouble of preparing them?"

The fees allowed clerks of the circuit courts for their services in criminal proceedings are enumerated in Section 483.530, RSMo 1949. And this list includes such items as those mentioned in your request.

May the clerk demand payment for these documents before going to the trouble of preparing them? The law in Missouri is entirely silent on this question. The clerk, however, "shall charge and collect for the county

in all cases every fee accruing to his office," as provided by Section 483.550, RSMo 1949. He must "pay monthly into the county treasury the amount of all fees collected by virtue of his office except fees collected in cases of change of venue from other counties," as provided in Section 483.560, RSMo 1949.

Within the clear meaning of the law the clerk of the circuit court is under legal duty to exercise due care and diligence in collecting the fees of his office and turning them over to the county treasurer. He may in certain cases find it expedient to demand payment in advance of the service, and there is no reason for holding that he may not do so.

The general rule of law governing this question is defined in Corpus Juris Secundum, Vol. 67, page 359, as follows:

> "Where a statute prescribes the fees which an officer shall receive and omits specially to provide when, how and by whom they shall be paid, the person at whose request the service is rendered is liable and the officer is entitled to payment as the services are performed. Fees are sometimes payable in advance of the performance of the official service wanted, and a statute intended only to prevent the exaction of larger fees than the law allows does not prevent the collection of the prescribed fee in advance in a proper case; but under some provisions, the state is entitled to have particular papers filed without paying the filing fee in advance, as is required of private individuals. When an officer is unable to collect his fees for services performed from the person liable to pay them, he must bear the loss, and an officer who inadvertently or otherwise files a paper for which a fee is required to be paid is forthwith bound to account for such fee whether or not he collected it at the time the paper was left for filing. An officer is protected in refusing to deliver official papers, or in

> retaining papers and documents in his possession in respect of which he has rendered service, until the fees are paid."
>
> (Underscoring ours.)

This principle was upheld by the Supreme Court of Iowa in Ripley v. Gifford, 11 Iowa 367. In the course of that opinion, at page 370, the court said:

> "There is no statute fixing the fees of Secretary of State, Clerk of the Supreme Court, Recorder, Sheriff, Coroner, Constable, Notary Public, Justice of the Peace or County Surveyor. And yet beyond controversy, they are each entitled to compensation for their services. This compensation, if not fixed and settled at the time the services are required, would be what the same were reasonably worth. Each officer may also, in our opinion, if he so desire, require the pre-payment of fees for the services demanded. Or, for any services rendered, he may retain any papers or documents in his possession in and about which he has bestowed labor, until the reasonable value of said services shall be paid. Thus if the clerk of the Supreme Court, or a justice of the peace, is required to issue an execution, he may either demand the pre-payment of his fee therefor, or refuse to deliver the same after its preparation, until such fee shall be paid. * * *"

CONCLUSION

It is the opinion of this office that the clerk of

Mr. B. C. Tomlinson

the circuit court may demand payment in advance for certified copies of records in his office.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

BAT/fh

TAXATION: VOID TAX SALE: PURCHASER'S BID TO BE REFUNDED, WHEN:

County court is authorized to refund amount of bid and interest to purchaser at void tax sale only under circumstances provided by Section 140.530, RSMo 1949. Court cannot legally refund total amount of taxes, plus interest on same to purchaser who paid taxes on land described in collector's deed for years subsequent to void tax sale.

FILED
89

January 15, 1952

1-25-52

Honorable J. W. Thurman
Prosecuting Attorney
Hillsboro, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which request reads as follows:

> "I enclose herein copy of a letter just received from the County Clerk wherein he requests an opinion as to the authority or duty of the County Court to reimburse a purchaser of delinquent property under the circumstances disclosed in his lstter.
>
> "As I construe Section 140.530 under circumstances such as mentioned by Mr. Coleman, the Court has no choice other than to refund with interest the amount paid Mr. Neubauer, at the time this land was sold for delinquent taxes together with the sum he has expended in payment of the taxes which have accrued since the date of purchase.
>
> "In the event you conclude that my construction of the Statute is right I should also like to know out of what funds the refund should be made."

From the facts given in the opinion request and also in the enclosed copy of a letter of the County Clerk of Jefferson County

Missouri, addressed to you, it appears that a Mr. Neubauer purchased certain real estate at a tax sale and received a collector's deed on November 3, 1947. The property was offered for sale and returned as delinquent for nonpayment of taxes, interest, penalties and costs for the years 1942, 1943, 1944, 1945 and 1946. The purchaser paid the taxes on the property described in his deed, for the years 1947, 1948, 1949, 1950 and 1951, and after payment of the 1951 taxes, he first learned that said land had been doubly assessed on the tax books, that he received no title by virtue of the collector's deed, and had been paying taxes on property he did not own during the years subsequent to the tax sale.

The purchaser now demands the county court to refund to him the amount of the original bid plus eight percent interest on such sum from November 3, 1947. He also demands a refund of the total amount of taxes paid by him for the years 1947 to 1951, inclusive, plus interest on that sum at the rate of eight percent per annum.

From the opinion request and the copy of the County Clerk's letter it was not clear whether the property had been merely doubly assessed or whether it had been doubly assessed under two different land descriptions and no taxes had been paid on either of them, so we found it necessary to ask you to explain the facts more in detail.

Your second letter greatly clarifies the facts concerning this matter, and it now appears that the land had been originally described in the tax books by acreage, but that some time later, (no date is given) the owner subdivided the property into lots and blocks and that the two descriptions appeared on the tax books at the same time and presumably assessed to the same owner. The owner paid taxes on the lots and blocks description but the land was sold for delinquent taxes for the years mentioned above under the original, or acreage description, although no taxes were due at the time of the sale.

In your second letter you have repeated your request for an opinion, and since we find said request expressed in clear and concise terms, we shall adopt same as the basis upon which to write the opinion.

Said request reads as follows:

> "The question for your decision is, should the county re-imburse the purchaser at the tax sale for the amount of his bid and also for the amount of taxes he has paid since he

> purchased the property at the tax sale. Furthermore is he entitled to interest? If you find the County should re-imburse the purchaser then we should like to know what fund it should be paid out of."

It is intimated that the purchaser received no title to the land purchased because the sale was void and your first inquiry deals with this situation, namely, the authority of the county court to reimburse the purchaser for the amount of his bid and interest on that amount.

Section 140.530, RSMo 1949, provides the circumstances under which a tax sale is void and the duty of the county court to refund the purchaser the amount of his bid and interest, to be paid out of the county treasury. Said section reads as follows:

> "No sale or conveyance of land for taxes shall be valid if at the time of being listed such land shall not have been liable to taxation, or, if liable, the taxes thereon shall have been paid before sale, or if the description is so imperfect as to fail to describe the land or lot with reasonable certainty and for the first two enumerated causes, the money paid by the purchaser at such void sale shall be refunded, with interest, out of the county treasury, on order of the county court."

This section is the same as Section 11156, Mo. R. S. 1939, and in the case of Sharp v. Richardson, 182 S. W. (2d) 151, 353 Mo. 138, the court had occasion to construe this and another section of the statutes. The facts involved were in some respects similar to those given in the opinion request, in that property purchased by a trustee for the county at a tax sale held in New Madrid County was bid in by the trustee, who later sold it to another person and which land was finally purchased by the appellant. The property was described as "14 acres, N. W. quarter of S. W. quarter, except certain town lots * * *." The owner had paid the taxes prior to the sale and later brought suit to recover the property, contending that the tax deed was void because of the indefinite description of the land sought to be conveyed thereby, and for the further reason that the sale was void because no taxes were due on the property at the time of the sale, as they had been previously paid by the owner.

In commenting upon appellant's contention, the court said at l. c. 143 and 144:

> "First, appellant says that the petition fails to state a cause of action because it does not offer to refund to defendant the taxes paid by him or his predecessors in title, citing Section 11179, Revised Statutes Missouri 1939, (Mo. R. S. A. vol. 22, p. 384) and two cases construing that statute. The contention cannot be sustained under the circumstances of this case. Neither the appellant nor his predecessors have paid any taxes. No doubt the county applied the money received from the sale by its agent, Steele, to the payment of taxes appearing to be due under the assessment as part of a section, but it had already collected the taxes from respondent under an assessment as lots and blocks. The tax sale to appellant's predecessor in title was void for two reasons mentioned in Section 11156, Revised Statutes Missouri 1939 (Mo. R. S. A., vol. 22, p. 359) to wit: because the taxes had already been paid before the sale and the assessment upon which the sale was based failed to describe the land with reasonable certainty. The latter section further provides that if the sale is void for either of the reasons mentioned the purchase money shall be refunded by the county. We think the meaning of the two sections, when read together, is that an owner who seeks to set aside a tax sale must offer to refund any taxes which he has failed to pay and which have been paid by the purchaser at the tax sale or his grantees, <u>but if the owner has already paid the taxes before the sale the purchaser must look to the county for the refund of any taxes paid by him after they have previously been paid by the owner.</u>"

(Underscoring ours.)

In answer to your first inquiry, it is our thought that upon proper application and proof being offered by the purchaser at the void tax sale, it shall be the duty of the County Court of Jefferson County to refund to such purchaser, out of the county treasury, the amount of the bid, plus interest on such amount from November 3, 1947, until date of payment under the

provisions of Section 140.530, supra,

Your second inquiry is whether or not it is the duty of the Jefferson County Court to reimburse the purchaser at the void tax sale for the total amount of all taxes, and interest on such sum, expended by such purchaser for taxes in the years subsequent to the tax sale.

It appears that the purchaser had paid the taxes upon the property described in his tax deed for the years, 1947 to 1951, inclusive, and had paid the taxes for 1951, before first learning that he had not received any title to such property, and it is for these years' taxes and interest that he demands the court to reimburse him.

In discussing yourfirst inquiry, it was pointed out that the purchaser was entitled to a refund for the amount of his bid and interest, by reason of the void tax sale only because Section 140.530, authorized the county court under such circumstances to make the refund from county funds, as there was no common law duty upon the state or the former owner to reimburse a purchaser at a void tax sale.

The same rule applies also to the circumstances mentioned in your second inquiry. There is no common law liability of the county to reimburse a purchaser at a void tax sale for the amount of money expended by him for taxes on the property described in his deed in years subsequent to such tax sale.

Section 140.530, supra, does not provide that the county shall make the refund to a purchaser for taxes in years subsequent to such sale and no other Missouri statutes authorize the court to make such a refund. In the absence of a statute authorizing such action, the county is not liable and the court is not authorized to reimburse the purchaser as suggested in the second inquiry of the opinion request.

Therefore, in answer to your second inquiry, for the reasons given above, it is our thought that the County Court of Jefferson County lacks the power and cannot legally refund to the purchaser (from county funds) the amount expended by him for taxes in years subsequent to the void tax sale on property described in the purchaser's tax deed, together with interest on such amount.

Your third inquiry is to the effect (anticipating that the answers to the first and second inquiries are in the affirmative)

as to what county funds the county court may draw upon in making the tax refund and interest to the purchaser referred to in the opinion request.

The same inquiry has been discussed in an opinion of this department rendered to the Honorable John W. Mitchell, Prosecuting Attorney of Buchanan County, Missouri. It is believed that the opinion fully answers your third inquiry, and we are therefore enclosing a copy of that opinion for your consideration.

CONCLUSION

It is the opinion of this department that where real estate was sold for taxes by a county collector and that the taxes on such property had been paid by the owner prior to such sale, the sale was void and the purchaser received no title to the property described in the collector's deed, but that such purchaser may make proper application and proof to the county court of the county in which the sale was held for a refund of his bid and interest. Upon being satisfied of the validity of the claim, if shall be the duty of the county court to refund to such purchaser the amount of his bid with interest from the date of the sale until payment is made from the county treasury. That the liability of the county and the duty of the county court to make the refund to the purchaser is not created by the common law, but only under the provisions of Section 140.530, RSMo 1949. No Missouri statutes provide that the county shall be liable and shall refund to a purchaser at a void tax sale the total amount expended by him with interest thereon for taxes on the property described in his tax deed for the years subsequent to such void tax sale, and it is the further opinion of this department that under these circumstances the county court lacks the power and cannot legally refund the amount of the subsequent years' taxes and interest thereon to such purchaser.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PNC:hr

ELECTIONS: April 29th last day for filing for nomination in August primary.

January 31, 1952

FILED
89.

Honorable Walter H. Toberman
Secretary of State
Capitol Building
Jefferson City, Missouri

Dear Mr. Toberman:

We have your recent letter in which you request an opinion of this department as to the deadline for filing for nomination to be made in the August primary election. Your letter is as follows:

> "We respectfully request your opinion as to the deadline for filing for nomination to be made in the August primary election."

In answer to your inquiry we direct your attention to Section 120.340, RSMo 1949, which reads, in part, as follows:

> "The name of no candidate shall be printed upon any official ballot at any primary election unless such candidate has on or before the last Tuesday of April preceding such primary filed a written declaration, as provided in sections 120.300 to 120.650, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, * * *"

We point out that the statute states in effect that the candidate must file on or before the last Tuesday of the April preceding the August primary. A reference to the calendar indicates that the last Tuesday of next April, which month of April precedes the next August primary, falls on the 29th of the month.

Hon. Walther H. Toberman

CONCLUSION

We are accordingly of the opinion that the deadline for filing for nomination to be made in the August primary 1952, is 12:00 o'clock midnight, April 29, 1952.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

SMW:mw

APPROVED:

J. E. TAYLOR
Attorney General

LOTTERIES: A transaction, whereby with the sale of an admission ticket or a sale of merchandise, a coupon would be given, entitling the holder to a chance at a prize, would be a lottery and would therefore be illegal.

FILED
89

February 15, 1952

2-18-52

Honorable Albert Thomson, Attorney
Board of Police Commissioners
Kansas City 6, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

> "We would appreciate your office advising us whether the outlined procedure would be in violation of the statutes of the State of Missouri.
>
> "It is proposed by various businesses that with each admission ticket or sale a coupon be given. The customer will retain a stub bearing the coupon number and the other portion of the coupon will be placed in a receptacle. At periodic intervals there will be a drawing from the receptacle and the individual whose name appears upon the coupon drawn will be entitled to a prize. It is contemplated that the party whose name appears would be entitled to the prize whether he was present at the drawing or not.
>
> "Our question is whether this procedure will constitute an enterprise forbidden under the statutes of the State of Missouri."

It is obvious that the legality or illegality of the proposed transaction set forth by you above depends upon whether it is or is not in violation of the Missouri law prohibiting lotteries. In order, therefore, to decide whether such a proposed transaction would or would not be a lottery, we must examine its component parts in the light of the law and the interpretations of the law made by the courts in regard to lotteries.

The Missouri law prohibiting lotteries is found in Section 563.430, RSMo 1949. This section reads:

> "If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, or any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

Since its enactment, this statute has been, on numerous occasions, construed by the appellate courts. A fairly recent, and very comprehensive discussion of it is to be found in the 1937 Missouri Supreme Court decision in the case of State ex inf. McKittrick, Atty. General, v. Globe Democrat Publishing Co., 110 S.W. (2d) 705.

We shall not enter upon any extensive discussion of this case here for the reason that the fact situation in it is not similar to the fact situation in the instant case. It is, however, of value to us in that it clearly defines the three elements, all of which must be present, which together constitute a lottery. At l.c. 713, the Court, in the above case, states: "The elements of a lottery are: (1) Consideration; (2) Prize; (3) Chance."

It is clear that two of these elements, to-wit, "prize" and "chance" are present in the proposed transaction which you describe. We have therefore only to determine whether the third element, "consideration," is or is not present.

In your letter you state that the drawing, at which a prize will be given, is based upon a coupon which will be given to

each person purchasing an admission ticket or to whom a sale of goods has been made. We assume that the price of admission or the price of the goods sold, will not be increased because a coupon, giving the holder thereof a chance at a prize, is given with the sale of an admission ticket or the sale of goods. Therefore, ostensibly the giving of such a coupon is a "free" gift for which no money is paid by the recipient. Under these conditions can it be said that the recipient of the coupon gives any "consideration" for the coupon?

In order to obtain light upon this matter, we turn to the 1938 decision of the Missouri Supreme Court, in banc, in the case of State v. McEwan, 120 S.W. (2d) 1098. At l.c. 1098 and 1099, the Court made the following statement regarding the fact situation in that case:

> "'In substance the information alleges that the defendant in setting up and establishing "Bank Night" furnished at the Ashland Theatre a registration book, a drawing box, and a quantity of numbered coupons or tickets, and certain advertising media for the screen and the front of the theater. The registration book contained serial numbered lines and was installed in the outer lobby of the theater for the registration of names and addresses of persons over the age of 18 years who might be interested in a drawing. The coupons bore serial numbers corresponding to the serial numbers in the registration book. As names were registered opposite the numbers in the registration book, coupons or tickets bearing identical numbers were deposited in the drawing box. All persons over the age of 18 years, including patrons, nonpatrons, and members of the public generally, were invited to do two things:
>
> "'(1) To call at the theater and register their names and addresses in the registration book at will and without charge.
>
> "'(2) To be present at the theater, either inside or outside, at 9 o'clock sharp on each Saturday night.

"'In this connection the theater offered said persons over the age of 18 years, who would comply with said conditions of registration and attendance, the following:

"'(1) It would provide a prize of $25 for each Saturday night.

"'(2) It would draw one coupon or ticket from the box on the stage each Saturday night at 9 o'clock and immediately announce the number and the name thereon from the stage and at the front door of the theater.

"'(3) It would award the prize at such time, if, as and when the holder of the number drawn made claim for same within 2½ minutes after said announcement.

"'(4) In the event the holder of the winning number thus announced was on the outside of the theater, and heard the announcement, identified himself and made claim for the prize within 2½ minutes, he would be permitted to enter the theater, and obtain the prize without paying any admission fee.'

* * * * *

"'The lone issue in this case is the sufficiency of the information. This turns upon the question of whether "Bank Night" contains all the essential elements of lottery, namely, prize, chance and consideration. The State contends that the information sufficiently charges the awarding of a cash money prize, for a consideration, by chance.'

"Respondents conceded that the elements of prize and chance were present in the scheme commonly called 'bank night' as described in the information. Respondent contends, however, that the third element, that is, consideration, was lacking."

At l.c. 1100 and 1101, the Court stated:

"* * * However, in detecting fraud and deception justice should have the vision to discover them in their true nature no matter how well the design to deceive. The courts would be blind indeed if they could not see that the scheme described in the indictment is a deliberate plan to evade the lottery statute and at the same time attain the result which the statute has prohibited. The history of these cases conclusively shows that the entire scheme is a deliberate plan to evade the lottery statute. Courts have uniformly held that the scheme of 'bank night' is a lottery when the participants therein are limited to those purchasing tickets to the theater. Respondent concedes that to be the law. The plan, as described in the information, attempts to eliminate one of the elements of lottery, that of consideration. In the practical operation of the scheme the element has not been eliminated because it is not in fact free. The Supreme Court of Texas, in the case of City of Wink v. Griffith Amusement Co., 100 S.W. 2d 695, loc. cit. 699 (9-11), correctly analyzed the situation. The court there pointed out that those remaining on the outside did not share equally with those who paid an admission. Those who paid admission witnessed the drawing and heard first hand the announcement of the winning number. Those upon the outside did not. The court concluded: 'This admission charge is inseparable from the privileges enumerated, which were materially different from the privileges of those who remained outside of the theater holding the so-called "free" registration numbers. It is idle to say that the payment made for seeing the picture is not, in part at least, a charge for the drawing and the chance given. The things to be seen and done in the theater and the privileges above enumerated which accompanied them, are all a part of one and the same show, meaning the entire proceedings inside the theater. The fact that part of the things to be enjoyed by those who paid

at the door were classed as "free" by the defendant in error does not change the legal effect of the transaction, or what was actually done by defendant in error, namely, for the price of admission to grant the patron not only the opportunity to see and hear the picture, but to see and hear and enjoy the habiliments of the "Bank Night", drawing, etc. detailed above. We are unable to see in what manner the giving of free registration numbers to those outside of the theater would change the legal effect of what was done inside the theater, for which a charge was made.'"

* * * *

"So the scheme described in the information has, in actual practice, all the elements of a lottery, and is just as harmful as if it were limited to those purchasing tickets. See Commonwealth v. Wall (Mass.) 3 N.E. 2d 28, loc. cit. 30, where the court said:

"'On the other hand, a game does not cease to be a lottery because some, or even many, of the players are admitted to play free so long as others continue to pay for their chances. Glover v. Malloska, 238 Mich. 216, 219, 213 N.W. 107, 52 A.L.R. 77; State v. Eames [87 N.H. 477] 183 A. 590, 592. So here the test is not whether it was possible to win without paying for admission to the theater. The test is whether that group who did pay for admission were paying in part for the chance of a prize. The jury could disregard all evidence introduced by the defendant favorable to him. They could take a realistic view of the situation. They were not obliged to believe that all the ingenious devices designed to legalize this particular game of chance were fully effective in practical operation. * * *

"'A participant outside the theatre must wait in discomfort in the hope that if his name should be drawn within he would be notified and would hear the call soon enough to crowd through toward the front of the theatre within

> such time as might be allowed. The object of the defendant was to fill the theatre, not the lobby or the sidewalk.'"

At l.c. 1102, the Court stated:

> "In 38 C.J. 292, Sec. 7, it is said: 'Whatever may be the nature of the consideration required it may be given either directly or indirectly. The benefit to the person offering the prize does not need to be directly dependent upon the furnishing of a consideration.'"

In view of the McEwan case, supra, we believe it to be clear without further discussion that in the proposed transaction described by you, the element of "consideration" would be present, and that, therefore, since the additional elements of "chance" and "prize" are also present, the transaction would constitute a lottery and would be in contravention of the Missouri lottery law set forth above.

CONCLUSION

It is the opinion of this department that a transaction, whereby the sale of an admission ticket or a sale of merchandise, a coupon would be given entitling the holder to a chance at a prize, would be a lottery and would therefore be illegal.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

HPWab

APPROVED:

J. E. TAYLOR
Attorney General

ELECTIONS: Declarations of candidacy for nomination on Socialist Labor, Progressive, Christian Nationalist and Socialist Party tickets should be certified to county clerks by Secretary of State.

SECRETARY OF STATE:

FILED
89

May 1, 1952

V-6-52

Honorable Walter H. Toberman
Secretary of State
State of Missouri
Jefferson City, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

> "We have received declarations of candidacy for nominations under the Socialist Labor, the Progressive, the Christian Nationalist and the Socialist Parties.
>
> "Attached are copies of communications concerning the Christian Nationalist Party."

The communications concerning the Christian Nationalist Party to which you refer consist of a letter dated August 25, 1951 addressed to the Secretary of State, signed by several persons purporting to state that the Christian Nationalist Party was dissolved. The other letter is one signed by Don Lohbeck, as State Chairman of the Christian Nationalist Party under date of March 31, 1952, addressed to the Secretary of State, stating that none of the persons signing the letter of August 25, 1951 had any connection with the Christian Nationalist Party after June, 1951, and that only one of those persons was at any time a member of the State Committee of the Christian Nationalist Party.

Section 120.300, RSMo 1949, provides as follows:

> "Hereafter, except as otherwise provided by law, all candidates for

> elective offices shall be nominated by a primary election held in accordance with sections 120.300 to 120.650. Sections 120.300 to 120.650 shall not apply to special elections to fill vacancies, nor to county superintendents of schools, to city officers not elected at a general state election, to town, village or school district officers."

Section 120.340, RSMo 1949, provides as follows:

> "The name of no candidate shall be printed upon any official ballot at any primary election unless such candidate has on or before the last Tuesday of April preceding such primary filed a written declaration, as provided in sections 120.300 to 120.650, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form:
>
> "I, the undersigned, a resident and qualified elector of the (.....precinct of the town of .....), or (the ..... precinct of the .....ward of the city of .....), or the .....precinct of .....township of the county of ..... and state of Missouri, do announce myself a candidate for the office of .... on the .....ticket, to be voted for at the primary election to be held on the first Tuesday in August, ..., and I further declare that if nominated and elected to such office I will qualify."

Section 120.350, RSMo 1949, provides in part as follows:

> "Each candidate, except a candidate for a township office, previous to filing

> declaration papers, as in sections 120.300 to 120.650 prescribed, shall pay to the treasurer of the state or county central committee of the political party upon whose ticket he seeks nomination a certain sum of money, as follows:"

Section 120.380, RSMo 1949, provides as follows:

> "At least eighty-five days before any primary preceding a general election, the secretary of state shall transmit to each county clerk a certified list containing the name and post office address of each person who shall have filed declaration papers in his office and entitled to be voted for at such primary, together with a designation of the office for which he is a candidate and the party or principle he represents."

It is obvious that it is the duty of the Secretary of State, when declarations of candidacy are filed in his office, accompanied by the receipt of the treasurer of a political party showing that the correct amount has been paid by the person desiring to become a candidate, to certify such names to the county clerks as provided in Section 120.380 quoted supra.

The mere fact that the Secretary of State received during 1951 a communication signed by certain persons stating that such persons dissolved the Christian Nationalist Party of Missouri gives the Secretary of State no right to refuse to accept a proper declaration of candidacy by any person who wishes to file as a candidate on the Christian Nationalist Party ticket, if such declaration is accompanied by a receipt signed by the treasurer of the State Committee of such party or the correct filing fee for the office for which the declaration is made.

Of course, declarations of candidacy by persons on the Socialist Labor, the Progressive and the Socialist Parties should be certified to the county clerks if such declarations are accompanied by the proper receipts by the treasurers of the State Committees of such parties.

CONCLUSION

It is the opinion of this department that the Secretary

of State should certify to the county clerks declarations of candidacy made by persons who are filing for nomination on the tickets of the Socialist Labor, Progressive, Christian Nationalist and Socialist Parties, if such declarations are accompanied by receipts signed by the treasurers of the State Committees of such parties in the correct amounts.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CBB:lrt

CIRCUIT JUDGE--Term of office on appointment to fill a vacancy under non-partisan court plan.

:A Circuit Judge appointed to fill a :vacancy under the provisions of the :non-partisan court plan provided in :Art. V of the Constitution of this :State will hold office for a term :ending Dec. 31, following the next :General Election after the said Cir-:cuit Judge has been in the office for : a period of twelve : months after his ap-: pointment.

FILED
89

May 15, 1952

5-14-52

Honorable Walter H. Toberman
Secretary of State
Jefferson City, Missouri

Dear Mr. Secretary:

This will be the opinion you requested from this office respecting the date of termination of the tenure of office of Honorable J. Casey Walsh, Judge of the Eighth Judicial Circuit of Missouri in the City of St. Louis, Missouri, under the terms of Section 29(c), Article V of the Constitution of this State, 1945. Your letter requesting the opinion reads:

> "J. Casey Walsh was commissioned as Judge of the Eighth Circuit, St.Louis City on November 6, 1951.
>
> "This question has been raised, 'In view of Section 29(c), Article 5 of the Constitution, does his term of office expire on December 31, 1952 or 1954?'
>
> "We respectfully request your opinion in this matter."

We are advised by your office that Judge Walsh was appointed Judge of the Eighth Judicial Circuit in the City of St. Louis, Missouri, on November 6, 1951, by the Governor, under the non-partisan court plan provided in the Constitution of this State, to succeed Judge E. M. Ruddy, resigned.

Section 29(a) of Article V of our present Constitution providing procedure for the appointment by the

Honorable Walter H. Toberman:

Governor of a Circuit Judge, and other Judges in this State, when a vacancy occurs, under the non-partisan court plan, reads as follows:

> "Whenever a vacancy shall occur in the office of judge of any of the following courts of this state, to wit: The supreme court, the courts of appeals, the circuit and probate courts within the city of St. Louis and Jackson County, and the St. Louis courts of criminal corrections, the governor shall fill such vacancies by appointing one of three persons possessing the qualifications for such office, who shall be nominated and whose names shall be submitted to the governor by a nonpartisan judicial commission established and organized as hereinafter provided."

Your letter recites that the question of whether the term of office of Judge Walsh will end on December 31, 1952 or 1954 presents itself by reason of the provisions of Section 29(c) (1), Article V of the 1945 Constitution. That part of Section 29 (c) (1) applicable to the question and which we will construe under your request, reads as follows:

> "Each judge appointed pursuant to the provisions of sections 29(a) - (g) shall hold office for a term ending December 31st following the next general election after the expiration of twelve months in the office. * * * ."

The next General Election in this State after November 6, 1951, the date of the appointment of Judge Walsh as Circuit Judge in the City of St. Louis, Missouri, will be held on November 4, 1952. Judge Walsh will have been in the office of Judge of the Eighth Judicial Circuit in the City of St. Louis, Missouri, two days less than twelve months on November 4, 1952.

Honorable Walter H. Toberman:

The next General Election after the expiration of twelve months in the said office by Judge Walsh will be held in this State on November 2, 1954.

Section 1 of Article VIII, Constitution of Missouri, 1945, providing for the day and year of holding General Elections in this State reads as follows:

> "The general election shall be held on the Tuesday next following the first Monday in November of each even year, unless a different day is fixed by law, two-thirds of all members of each house assenting."

Sub-section (3) of Section 1.020, RSMo 1949, construes "General Election" as follows:

> "'General election' means the election required to be held on the Tuesday succeeding the first Monday of November, biennially;"

The General Assembly of this State has passed no Act fixing a day for holding General Elections different from the day fixed by the Constitution in said Section 1, Article VIII, supra.

Section 29(g), Article V of our present Constitution making all of the provisions of Sections 29(a) - (g) self-enforcing reads as follows:

> "All of the provisions of sections 29 (a)-(g) shall be self-enforcing except those as to which action by the general assembly may be required."

That part of Section 29 (c) (1), supra, providing that a Judge, including a Circuit Judge, appointed pursuant to Sections 29 (a) - (g), shall hold the office for a term

Honorable Walter H. Toberman:

ending December 31st following the next General Election after the expiration of twelve months in office, is a complete, substantive and effective provision of our present Constitution, on this question, standing alone, without reference to any other part or provision of said Section 29(c). It is self-enforcing under the provisions of Section 29(g), supra, and does not require, nor does it have, any action by the General Assembly. That part of said Section 29 (c) (1) quoted, supra, is clear and conclusive, we believe, to determine, under the facts existing in this case, that the term of office of Judge Walsh as Judge of the Eighth Judicial Circuit in the City of St. Louis, Missouri, will expire on December 31, 1954, following the General Election on November 2, 1954.

CONCLUSION

It is, therefore, the opinion of this department that, under the provisions of Section 29 (c), Article V of the present Constitution of this State, the term of office of Judge J. Casey Walsh as Judge of the Eighth Judicial Circuit in the City of St. Louis, Missouri, will expire on December 31, 1954, since the General Election to be held on November 2, 1954 will be the next General Election held in the State after Judge Walsh has been in said office twelve months.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GWC:ir

AGRICULTURE: Regulations 3, sub-part a and 4, sub-part a, are valid and enforceable insofar as they do not conflict with applicable federal regulations upon the same subject.

FILED
89

June 13, 1952

6-13-52

Honorable Robert T. Thornburg
Commissioner
Department of Agriculture
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department, which request reads in part as follows:

> "Registrations of some canned dog food products have been refused as the labels for these products were not in compliance with regulation 3 and regulation 4 (page 11, Missouri 1951 Feed Bulletin).
>
> "Regulation 3, in part, reads as follows: 'A brand name may not be derived from one or more ingredients of a mixture. A distinctive name shall not be one representing any component of a mixture.'
>
> "Regulation 4, in part, reads as follows: 'The label must be printed on one side of a tag attached to the package itself in type of sufficient size to be easily read and the names of all ingredients must be printed in type of the same size.'
>
> "Reference, herein, is specifically made to 'Chappel Horsemeat' a product of The Quaker Oats Company. The label for their product, being in violation of the above noted regulations, has been the cause for refusing registration of this product with the Department of Agriculture.

> "Will you please give us an opinion on these regulations as they pertain to the labeling of canned dog food and the request for compliance therewith before accepting such products for registration for sale in Missouri."

In 1941 the General Assembly enacted the laws relating to the manufacture, sale and distribution of adulterated, mislabeled or unregistered dog food within this state. Said laws are carried in the 1949 Revised Statutes as Sections 273.190 to 273.320.

Section 273.210 prohibits the sale, offer or exposure for sale in this state of any dog food which is mislabeled or unregistered as follows:

> "No person shall, within this state, manufacture, sell distribute, offer or expose for sale any dog food, which is adulterated, mislabeled or unregistered, within the meaning of sections 273.190 to 273.320."

Section 273.230 provides what dog foods shall be deemed to be mislabeled as follows:

> "Dog food shall be deemed to be mislabeled:
>
> (1) If it is not labeled; or
>
> (2) If the label contains any inaccurate statements, or does not conform in all particulars with the label approved by the said commissioner in connection with the registration of the distributor's dog food under sections 273.190 to 273.320."

Section 273.240 specifies certain conditions which must be complied with by a distributor before he may sell or distribute in this state any brand or kind of dog food. Said section provides as follows:

> "Before any manufacturer, importer, jobber, firm, association, corporation, partnership or individual, herein called a distributor, shall sell, offer or expose for sale or distribution in this state any brand or kind of

> of dog food, as defined in section 273.200, he shall have certified to the said commissioner that his product meets with and conforms to all the provisions of sections 273.190 to 273.320 and such regulations as the said commissioner may prescribe. Upon receipt of such certification, the said commissioner shall make such investigation as may be necessary to determine whether the distributor is complying with all provisions of sections 273.190 to 273.320 and all regulations issued by the said commissioner thereunder. If the said commissioner finds that the certificate furnished by the distributor is a correct statement, and that the product complies with the provisions of sections 273.190 to 273.320, he shall then, and then only, register the brand or kind of dog food, concerning which the distributor has made a certification. Nothing herein contained shall be construed as requiring the registration by any distributor or dealer of any brand or kind of dog food which is already once registered for the current license year with the said commissioner."

Section 273.270 specifies the contents of the certification required by Section 273.240. Sub-part 3 of said section reads as follows:

> "(3) A copy of the label of the brand or kind of dog food, which is being submitted for registration. The label must have imprinted thereon, in a conspicuous manner, a clear and legible statement in the English language, which covers the following:
>
> (a) The net weight of the contents;
>
> (b) The name, brand or trade-mark;
>
> (c) The name and principal address of the distributor or person responsible for placing the commodity on the market;
>
> (d) Minimum percentage of crude protein;
>
> (e) Minimum percentage of crude fat;

(f) Maximum percentage of crude fiber;

(g) The specific (common) name of each ingredient used in its manufacture."

Such laws are enacted under the police powers of the state and have as their purpose the prevention of fraud and deception in the sale of food for domestic animals. Section 273.300 authorizes the Commissioner of Agriculture to adopt such regulations as may be necessary to effectuate the purpose of the law. Said section reads as follows:

"The commissioner is authorized to promulgate reasonable regulations, not contrary to the terms and the intent of sections 273.190 to 273.320, in order to effectuate any of the purposes of sections 273.190 to 273.320."

Pursuant to the authority conferred by Section 273.300, the Department of Agriculture through the commission adopted certain rules and regulations which have been filed with the Secretary of State and became effective June 1, 1950, your opinion request is directed specifically to regulations 3, sub-part a, and regulation 4, sub-part a, which reads as follows:

"Regulation 3. Brand Names.

a. The name of a brand must not tend to mislead the purchaser with respect to any quality of the feed. If the brand name indicates that the feed is made for a specific use, the character of the feed must conform therewith. A mixture labeled 'dairy feed,' for example, must be adapted for that purpose.

A brand name may not be derived from one or more ingredients of a mixture. A distinctive name shall not be one representing any component of a mixture.

"Regulation 4. Labels Required on All Packages; Forms to be Used.

a. Each package of feeding-stuffs shall bear a complete label conforming to the 'uniform label' herein set forth and adopted by the Department of Agriculture. The label must be printed on one side of

> a tag attached to the package, or upon one side of the package itself in type of sufficient size to be easily read and the names of all ingredients must be printed in type of the same size."

The obvious and stated purpose of Regulation 3a is to prohibit a label upon an article of food offered for sale which would tend to mislead the purchaser with respect to the quality. If the brand name is derived from one or more of the components of the mixture it would tend to lead the purchaser to believe that that was the sole ingredient of the product, for it is common knowledge that the ordinary purchaser, either through inadvertence or disinterest, fails to read the less conspicuous ingredient statement. Such a regulation, we believe, is warranted by the purpose and intent of the dog food law and within the authorization conferred upon the Commissioner of Agriculture by Section 273.300, supra.

The same conclusion would likewise be reached in regard to Regulation No. 4, which requires that the ingredients of a mixture be printed on a label in type of the same size. To allow one ingredient to appear more conspicuous than the others would lead a purchaser to believe that that was the most important or sole ingredient, when in fact it was the least or one of many. Clearly this was the evil which the dog food law was aimed at and which was properly the subject of legislative action.

Such regulations as here considered are nondiscriminatory and do not constitute an unreasonable burden upon interstate commerce, such as would be prohibited by the Federal Constitution.

We now turn to your question regarding compliance with these regulations prior to registration of a dog food for sale in this state. It is sufficient here to say that such regulations should be complied with by a distributor wishing to sell, offer for sale or distribute in this state so long as they do not conflict with federal legislation upon the same subject.

Pursuant to the provisions of Section 203 of the Agricultural Marketing Act (7 U.S.C.A. 1622), the Secretary of Agriculture, in 1950, adopted certain regulations in regard to the inspection, certification and identification as to class, quality, quantity and condition of canned wet normal maintenance food for dogs.

Regulation No. 155.32 provides, in part, as follows:

> "Sec. 155.32. Labeling required. Each container of inspected and certified products shall have affixed thereto a label bearing the following information prominently displayed:

> "(a) The name of the product, the ingredient statement, and the statement of certification, in the manner provided by subparagraphs (1), (2) and (3) of this paragraph in the case of canned certified maintenance food, and in the manner provided by subparagraphs (4), (5), and (6) of this paragraph in the case of canned or fresh frozen certified 32% component.
>
> * * * * * * * * * * * * * * * * * *
>
> "(4) The name of the canned or fresh frozen 32% component shall be the true name, such as 'meat', 'horse meat,' etc., and there shall appear contiguous to the name of the product the name of the decharacterizing agent used, followed by the word 'added,' as, for example, 'bone added. '"

We here take note that the dog food here in question, "Chappel Horse Meat," a product of the Quaker Oats Company, is, as defined in the federal regulations, a 32% component, and so have only quoted portions of the above regulations as pertain to such product.

Regulation 155.32(a) (4) requires the name of the canned 32% component to be the true name. The state regulation prohibits a brand name from containing the name of one or more ingredients of the mixture.

It is generally held that where there exists state and federal regulation upon the same subject of commerce which are in direct conflict, the state law is superseded. This rule is stated in 15 C.J.S., Commerce, Section 15, page 273:

> "A valid federal regulation of commerce supersedes existing, and excludes new, legislation by a state on the same subject, but where congress occupies only a limited field, state legislation outside that field and otherwise admissible is not displaced or forbidden.
>
> "Where congress regulates commerce by enacting a statute, within its competency, that covers the same subject matter as, or is in direct conflict with, a state statute, the exercised power of congress is not only supreme and paramount but also

> exclusive, superseding the state law and excluding additional or further regulation covering the same subject by the state legislature. * * *"

There exists between Federal Regulation 155.32 and Regulation No. 3, adopted by the state, a direct conflict, and therefore the operation of the state regulation is suspended insofar as it pertains to 32% component dog foods. However, such federal regulation does not have the effect of invalidating or repealing the state regulation.

Regulation No. 4 presents somewhat of a different question. Although the federal regulation requires the label of a dog food shipped in interstate commerce to contain an ingredient statement such regulations are silent upon that to which the state regulation is directed, i.e., the size of type.

Although the rule is as above stated in regard to a conflict between state and federal regulations it is limited in its application to cases where the conflict is direct and positive and there would seem to be a presumption against complete occupancy of the field by the federal government barring any state regulation upon the same subject of commerce.

It is stated in 11 Am. Jur., Sec. 24, page 26 as follows:

> "It is established that the exercise of the state's police power must yield when it comes in conflict with an affirmative exercise by Congress of its power to regulate commerce. However, the intention of Congress to supersede or exclude state action is not lightly to be inferred. In order for an act of Congress to supersede a state statute, the repugnance or conflict must be direct and positive, so that the two acts cannot be reconciled or consistently stand together, or, at least, Congress must have manifested a purpose to exercise its paramount authority over the subject. Congressional regulation of a business does not nullify state regulation of the same business, if the Federal act does no t cover the same field or is consistent with the state legislation or if the Congress has so circumscribed its regulation as to leave part of the subject open to state action. It is only where there is an actual and distinct conflict that the state law will be displaced and then only as to that part of the state law in actual conflict with the Federal law."

This rule has been adopted by the Supreme Court of the United States in the case of McDermott v. Wisconsin, 228 U.S. 115, 57 L. Ed. 754 in regard to state and federal regulation of articles of food stuff shipped in interstate commerce. The court in its opinion said:

> "While these regulations are within the power of Congress, it by no means follows that the state is not permitted to make regulations, with a view to the protection of its people against fraud or imposition by impure food or drugs. This subject was fully considered by this court in Savage v. Jones, 225 U.S. 501, 56 L. Ed. 1182, 32 Sup. Ct. Rep. 715, in which the power of the state to make regulations concerning the same subject-matter, reasonable in their terms, and not in conflict with the acts of Congress, was recognized and stated, and certain regulations of the state of Indiana were held not to be inconsistent with the food and drugs act of Congress. * * *"

This regulation requiring the list of ingredients printed on the label to be of the same size does not conflict with the federal regulation since none bear upon this point. The state in making such a regulation does not thwart the applicable federal regulation since a label can comply both with the state and federal regulation. Such requirement as is contained here is for the legitimate and further protection of the citizens of this state against misbranded dog food and not being inconsistent with any federal regulation is valid and enforceable.

CONCLUSION

Therefore it is the opinion of this department that Regulations 3 sub-part a and 4, sub-part a, of the Department of Agriculture are consistent with the purposes and intent of Sections 273.190 to 273.320, RSMo 1949, and within the authority of the Commissioner of Agriculture by Section 273.300 to promulgate such regulations and are therefore valid and enforceable insofar as they do not conflict with applicable regulations.

We are further of the opinion that a distributor of dog food (32% component), who has fully complied with federal regulations relating to such product need not comply with Regulation 3, sub-part a, since it conflicts with Regulation 155.32 issued by the

Honorable Robert T. Thornburg

Secretary of Agriculture and is superseded thereby.

Regulation 4, sub-part a, is not in conflict with any federal regulation upon the same subject.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DDG:hr

ELECTIONS:
POLITICAL PARTIES:
AMERICA FIRST PARTY: The candidates for president and vice-president of the America First Party should be certified out by the Secretary of State for the election to be held in November, 1952.

FILED
89

August 28, 1952

Honorable Walter H. Toberman
Secretary of State
State of Missouri
Jefferson City, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department reading as follows:

> "Enclosed are the papers of the America First Party, which were filed with this office on August 26, 1952.
>
> "We respectfully request that you advise us whether or not said Party should be placed on the ballot for the General Election in November."

The papers to which you refer are, first, the record of the organization of the America First Party of Missouri at a state convention held at the Aztec Room of the President Hotel in Kansas City, Missouri, Monday, August 25, 1952, at which meeting a temporary state chairman, temporary state vice-chairman, temporary state secretary and temporary state treasurer were selected, and a platform of such party adopted.

Secondly, the presidential electors of the America First Party and the nominees of such party for president of the United States and vice-president of the United States are contained in such papers. The nominee of the America First Party for president of the United States is Douglas MacArthur, and the nominee for vice-president of the United States of such party is Harry F. Byrd.

Thirdly, such papers contain a certification by the

temporary officers of the state committee of the America First Party and a copy of the emblem of such party.

In the case of State ex rel. v. Kortjohn, 246 Mo. 34, the Supreme Court of Missouri said with regard to the establishment of a new political party in this state, l.c. 42 and 43:

> "There is nothing to be found in the statute laws of Missouri preventing the organization of a new political party at any time the electors of the State see fit to so organize and declare principles. It may be true that we have made no express provision for an emergency of this kind, but it is equally true that from a legislative standpoint we have not placed a ban upon the organization of a new party, and personally I do not think we could place such a ban without treading dangerously near the constitutional inhibitions. We may regulate political parties after their organization in the exercise of the police power of the State, but that and no other power can suppress the alignment of our citizens with either old or new parties.
>
> "For such new organization there must be a starting point, and because the law makes no express provision for the starting point, it does not follow that the citizens believing in given principles cannot meet and organize in the old and accustomed ways, but when organized they must follow the regulations as prescribed by law."

We believe, therefore, that the America First Party was properly formed in this state. Such party adopted a platform and principles and creed in opposition to the platform, creed or principles of the other political parties of this state.

Since the founding convention of the America First Party selected candidates for president and vice-president of the United States, and also selected presidential electors for such party, we believe that such party is entitled to

a place on the ballot for the November election of 1952, and that the names of the candidates of the America First Party for president and vice-president of the United States should be by your office certified out to the county clerks and boards of election commissioners.

CONCLUSION

It is the opinion of this department that the Secretary of State should certify to the county clerks and boards of election commissioners of this state the names of the candidates of the America First Party for president and vice-president of the United States for the election to be held in November of 1952.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CBB:lrt

ELECTIONS: National director of political party may not withdraw names of presidential and vice presidential candidates.

October 21, 1952 10/22/52

FILED
89

Honorable Walter H. Toberman
Secretary of State
Jefferson City, Missouri

Dear Mr. Toberman:

This department is in receipt of your request for an official opinion which reads as follows:

> "Enclosed is a letter received this date from Mr. Lar Daly, relative to the withdrawal of the names of the candidates for president and vice president of the AMERICA FIRST PARTY.
>
> "We respectfully request your opinion as to our duties in the matter."

The enclosed letter quoted verbatim reads as follows:

> "October 15, 1952
>
> "Walter Toberman
> Secretary of State
> Jefferson City, Mo.
>
> "Mr. Secretary:
>
> "This is to officially inform you that, on October 11, 1952, the Board of Directors of the America First Party officially voted its dissolution. Similar action was also taken as regards the MacArthur for President Committee. The new name of this organization is now the 'MacARTHUR FOR EISENHOWER AND AMERICA FIRST'.
>
> "As the person who filed the incorporation papers for the America First Party, with MacArthur and Byrd as its candidates, in your office, on August 26, 1952, I hereby now make formal request

> that the America First Party, and its candidates, be withdrawn from the Missouri ballot.
>
> "If the ballots are already printed in the various counties of Missouri, and you feel that your office and the offices of the various county officials have charge of the printing of the ballots, do not have the authority to spend additional taxpayers money by having the ballots re-printed without the America First Party and its candidates appearing thereon, then I make the following offer to you, as the representative of the people of Missouri in the matter.
>
> "On behalf of the 'MacARTHUR FOR EISENHOWER AND AMERICA FIRST', I am authorized to inform you that we will pay the costs of reprinting all the Missouri ballots, if you will remove the names. Thanks for all past courtesies and co-operation, I remain,
>
> /s/ "Lar Daly
> "Nat'l Director"

A reading of the above discloses that one Lar Daly, ostensibly the National Director of the America First Party, requests you to withdraw the names of the candidates for president and vice president of the America First Party from the ballot to be used in the forthcoming general election.

The records of the office of the Secretary of State disclose that on August 25, 1952 a state convention of the America First Party was held in Kansas City, Missouri. At such time temporary officers were elected and a platform was drawn up. Presidential electors from the thirteen electoral districts of Missouri were chosen and the names of these electors were certified to the office of the Secretary of State. At the same time there were certified the names of Douglas MacArthur and Harry F. Byrd as the presidential and vice presidential nominees of "the America First Party of Missouri".

The sole question presented for discussion in this opinion is whether a "national director" of a party may withdraw the names of candidates for president and vice president from a state ballot.

Section 111.420, RSMo 1949, provides in part as follows:

> "2. A vote for any of such candidates for president and vice-president shall be a vote for the electors of the party by which such candidates were named and whose names have been filed with the secretary of state. The respective party state committees shall certify in writing the nominations of such presidential and vice-presidential candidates to the secretary of state at some time before the secretary of state is required by law to certify the candidates of the several political parties and groups of petitioners to the several clerks of the county court or to election commissioners. In presidential years an instruction shall be on the ballot as follows: 'A vote for names of candidates for president and vice-president is a vote for the electors of that party, the names of whom are on file with the secretary of state.'"

Section 120.840, RSMo 1949, reads as follows:

> "The state committee of any political party may call a convention of delegates, to be apportioned, chosen or elected in such manner as it may prescribe, for the purpose of nominating presidential electors, electing delegates to national conventions, electing members of national committees, adopting or making such declarations of party principles with reference to national questions as may be deemed advisable and to do and to perform any other act not prohibited by or inconsistent with sections 120.300 to 120.840."

A similar question was presented to the Supreme Court of Missouri, in banc in the case of ex rel. Bates vs. Crittenden, 164 Mo. 237. In that case the question presented was whether the State Central Committee of the Democratic Party could set aside the action of a county convention in nominating a ticket for the party. The Court said:

> "The right of the people to select their own public servants is an inherent principle

> of Democracy, and before a committee organized for the efficient management of party affairs of the State at large can set aside the action of a party acting under its own local government, it must first be shown that the local organization has either become disrupted and disorganized, and it is necessary to reorganize it, or that the nominations made for a particular election have been procured by fraud or in disregard of the usages and customs of the party, and it inevitable follows that the nominees of the local organizations whose nominations are to be set aside shall be accorded a hearing and a time and place fixed for that hearing, of which they shall have reasonable notice and an opportunity to present their evidence."

Applying the rule laid down in the above opinion to the facts in the instant case, it would be seen that the national officers of the America First Party may not withdraw or set aside nominees made by a state convention or by the state committee unless it be shown that the nominations had been procured by fraud or in disregard of the usages and customs of the party and further that the nominees had been accorded a hearing and an opportunity to present evidence. It does not appear that such requirements were met in the present situation.

CONCLUSION

It is, therefore, the opinion of this department that the Secretary of State is not authorized to withdraw from the ballot the names of the candidates for president and vice president of the America First Party solely upon the basis of a letter from the "national director" of said party requesting the Secretary of State to do so.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AMO'K:sw

RECORDERS:
COUNTIES:

Instruments retained on file in county recorder's office for one year as required by Section 59.360 RSMo 1949, to be disposed of in manner set forth in Section 59.430 if possible, and if not so disposed of the same may be removed to any convenient and safe storage space.

November 12, 1952

FILED
89

11/13/52

Honorable J. W. Thurman
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Sir:

The following opinion is rendered in reply to your recent request reading as follows:

> "Section 59.360 of the Revised Statutes, 1949, requires that certain instruments be retained in the Recorder's Office for one year after the instruments are recorded. At the present time, the Recording Office in this County is very cramped for space and in looking over their files they discovered that there was a very large number of the deeds that had been held pursuant to the above Section that had never been reclaimed. There are instruments in this group that go back as far as 1874. The County Recorder desires to remove a large portion of these old instruments and place them on file in the attic of the Jefferson County Court House. I might add that some such move is necessary if the Recorder is to continue to have room to carry on his business.
>
> "Please advise whether it is permissable for the Recorder to remove the above described documents up to the last ten years."

In your letter quoted above specific reference is made to Section 59.360 RSMo 1949, which contains the following language:

> "Whenever the recorder of deeds, or any other person acting as recorder of deeds, in any county in this state, shall record any instrument of writing affecting real estate, which purports to have been signed and acknowledged more than twelve months prior to the time the same is presented for record, he shall retain such instrument of writing in his office, subject to the inspection of all parties interested, for one year next succeeding the time such instrument shall be recorded; provided, that if any such instrument of writing shall affect real estate in more than one county, then as soon as it shall be recorded in the first county in which it may be filed, it shall be sent from county to county in the order named in the instrument of writing, by the respective recorders thereof, until it shall have been filed and recorded in each county in which any such real estate may be situated, and retained in the office of the recorder of the county in which it shall be last recorded until the expiration of one year after the last filing thereof; provided, that the recorders shall not be required to transmit such deed from county to county unless the party desiring the same recorded in such other county or counties shall first pay the recorder's fee, to be transmitted with the deed."

Section 59.360, RSMo 1949, quoted above, is so worded as to have specific application to "any instrument of writing affecting real estate, which purports to have been signed and acknowledged more than twelve months prior to the time the same is presented for record." Such statute does not disclose what disposition is to be made of such instruments after they have been retained in the recorder's office for one full year. The general statute touching disposition of recorded instruments in counties other than class one, and in cities containing six hundred thousand inhabitants, is Section 59.430 RSMo 1949, which provides:

Honorable J. W. Thurman

> "The recorder shall certify, on or under such deed, mortgage, conveyance, deed of trust, bond, commission or other instrument, so recorded, the day and time of the day, month and year, when he received it, and the book and page or pages of the book in which it is recorded, and, when recorded, deliver it to the party or his order."

In the absence of any directive appearing in Section 59.360, RSMo 1949, relative to disposition of instruments retained for one year as required by such statute, it seems clear that such instruments, after having been retained for the required period of one year are to be disposed of as provided in Section 59.430, cited above, and insofar as such a disposition can be accomplished at this date, the recorder should so dispose of such records. No statute has been discovered which will serve to prohibit the recorder from removing from his office files those instruments which have been retained for the period of one year as required by Section 59.360, RSMo 1949, and which cannot be delivered to the parties entitled thereto under Section 59.430, RSMo 1949, and the same may be stored in any convenient and safe storage space.

CONCLUSION

It is the opinion of this department that instruments required, under Section 59.360, RSMo 1949, to be kept on file in the county recorder's office for one year after recording, should then be disposed of as provided in Section 59.430, RSMo, 1949, and any such instruments not so disposed of may be removed from the recorder's office to any convenient and safe storage space.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:lw

MERIT SYSTEM
EMPLOYMENT SECURITY : 1) Chief Appeals Referee in Division of Employment Security not an attorney within exemption provisions of State Merit System Act; 2) Incumbent with merit system status under Merit System Council continues to enjoy merit status.

FILED
90

April 3, 1952

4/16/52

Honorable Ralph J. Turner
Director
Personnel Division
State Department of Business and Administration
630 Jefferson Street
Jefferson City, Missouri

Dear Sir:

This is in reply to your request for an opinion which we re-state as follows:

Prior to the enactment of the present State Merit System Law, a merit system was administered by the Missouri Merit System Council for several state agencies, including the Unemployment Compensation Commission and the Division of Employment Security.

Under the said merit system an employee of the Division of Employment Security obtained merit status in a position known as Chief Appeals Referee. The primary duties of this job involved the hearing of appeals from administrative determinations arising under the Unemployment Compensation Law, and did not include the ordinary duties of an attorney.

You ask:

1) Whether or not the position as Chief Appeals Referee is an exempt position under the present State Merit System Act;

2) Whether or not an employee with merit status under the Merit System Council as a Chief Appeals Referee may continue to enjoy such merit status subsequent to the enactment of the State Merit System Law, and

3) Since the present incumbent had merit system status under the Merit System Council is a new examination required or does he automatically retain his former merit status?

Included in your request are definitions and examples of work performed by the Chief Appeals Referee in the Division of Employment Security. We note that the primary duty of the Chief Appeals Referee is for supervision and organizing appeals from administrative determinations relating to unemployment compensation benefits and other such actions of the division.

We note that Section 288.370 (1), RSMo 1949, provides for legal counsel for the division.

Section 36.030 (4), RSMo 1949, provides for the exemption of attorneys regularly employed or appointed in any department or division subject to law. Since there is an attorney specifically provided for by statute for the Division of Employment Security, and since the primary duty of the Chief Appeals Referee is not that generally associated with legal counsel, we do not believe that exemption from the State Merit System Act is applicable to the job of Chief Appeals Referee as constituted in the past and at present. We do not believe that because a requirement once existed that the Chief Appeals Referee have the ability to secure a license to practice law in the State of Missouri is determinative of the question. We think the main question is whether or not the Chief Appeals Referee is an attorney as set forth in the exemptions under the State Merit System Act. Under all the circumstances we conclude that the job of Chief Appeals Referee is properly in the classified service.

You ask whether or not an employee with merit status under the Merit System Council as a Chief Appeals Referee may continue to enjoy such status.

During the same Session of which the State Merit System Act was passed the General Assembly also set up the Division of Employment Security in Laws of Missouri, 1945, page 1734, where we find the following provision for the continuance in office of employees then employed by the Unemployment Compensation Commission on a non-partisan merit system basis which reads as follows:

> "* * * The division shall establish and enforce fair and reasonable regulations for appointments, promotions, and demotions based upon ratings of efficiency

> and fitness and for terminations for cause; Provided, however, that all persons now employed by the Unemployment Compensation Commission on a non-partisan merit system basis shall be entitled to continue as employees of the division and shall have all the rights and privileges in such employment as are provided for new employees appointed and qualified under this section; and Provided, further, that the division may employ and fix the compensation of attorneys without regard to the provisions of this subsection."

We further find that Section 36.030 (9), RSMo 1949, provides for exemption as follows:

> "All positions and appointments in divisions of the service subject to this law which have been heretofore required to be filled upon the basis of merit and fitness; provided, however, that one year after this law becomes effective, this exemption shall cease and determine and thereafter the selection, appointment, pay, tenure and removal of persons to or from all such positions shall be governed by the provisions of this chapter; and provided further that all persons now or hereafter appointed or employed in divisions of the service on the basis of merit and fitness as heretofore required, shall be entitled, after their exemption from the provisions of this chapter ceases, to continue as employees in said division of the service and shall have all the rights and privileges in such employment as are provided for persons appointed and qualified under this law."

A fair reading of these hold-over provisions seems to indicate a clear legislative intent to permit persons in

positions which were required to be filled by the Merit System are to be retained. Therefore, we conclude that an employee with merit system status under the Merit System Council as Chief Appeals Referee continues to hold such merit status.

Your third question is whether or not a new examination is required or whether the present incumbent who had merit system status under the Council would recover his merit status automatically. Since we have ruled above that such an employee retains his status as a matter of law, he has never lost such status, and there is no present vacancy in the office of Chief Appeals Referee for which an examination is required.

CONCLUSION.

Therefore, it is the opinion of this department that:

1) The job of Chief Appeals Referee in the Division of Employment Security is not exempt from the State Merit System Act as an "attorney".

2) An employee with merit status under the State Merit System Council as Chief Appeals Referee continues to hold such merit status, and no new examination is required to fill this position.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JRB:ir

MOTOR VEHICLES:
SUSPENSION OF OPERATOR'S
AND CHAUFFEUR'S LICENSES:

Sec. 302.170(3) RSMo 1949, was repealed by Amended S.C.S. for H.C.S. for House Bills 22, 49, 56 and 114, 66th General Assembly, effective Jan. 1, 1952. Sec. 302.225(4) of act grants named courts power to order suspension and revocation of operator's and chauffeur's license for causes in act. Upon conviction of offense for which license can be, and is ordered suspended, trial court must report same to Director of Revenue, who has mandatory duty to suspend license for time specified in statute. Trial court cannot order license surrendered for suspension period.

FILED
92

April 1, 1952 4-9-52

Honorable Raymond H. Vogel
Prosecuting Attorney of
Cape Girardeau County
Cape Girardeau, Missouri

Dear Sir:

Your recent request for a legal opinion of this department has been received and reads as follows:

> "Please give me your opinion with regard to the matter set out below:
>
> "Section 302.170(3) of the Missouri Revised Statutes (1949) provides that the Magistrate may recommend the suspension or revocation of a drivers license upon conviction for a violation of any of the statutes regulating the operation of motor vehicles on highways. Apparently, this provision is repealed by the new drivers license law which became effective January 1, 1952. Section 302.225(4) of the new drivers license law provides that the Magistrate Courts shall have the power to suspend and the power to revoke 'for the causes herein provided.'
>
> "Section 302.270 and Section 302.280 of the new law apparently provide the only

> causes for which drivers licenses may be revoked or suspended. It therefore appears that the Director of Revenue may no longer suspend the drivers license upon conviction of a violation of the statutory road regulations, coupled with a recommendation of suspension by the Magistrate. It does appear that the Magistrate may himself suspend the drivers license of a person convicted in his Court when death, personal injury, or serious property damage results from wanton and reckless operation of a motor vehicle.
>
> "Please advise me if the above-stated conclusions are correct.
>
> "Section 302.225(5) provides that upon the suspension by a court, 'the court shall note the fact (of the suspension) on the back of the license . . .' Apparently there is no provision made for the surrender of the suspended drivers license as there was in the old law. Please advise if this conclusion is correct."

You make inquiry as to whether some of your conclusions regarding specific statutory references mentioned above are correct.

The first reference is to Section 302.170(3) RSMo 1949, and you state, "Apparently this provision is repealed by the new drivers license law which became effective January 1, 1952." Your conclusion that this section has been repealed is correct, as such section was repealed by Amended Senate Committee Substitute for House Committee Substitute for House Bills No. 22, 49, 56 and 114, of the 66th General Assembly, which became effective January 1, 1952.

If your second conclusion is that a magistrate court has the power to order the suspension of the operator's or chauffeur's licenses for the causes provided in said act, we agree that such conclusion is correct. Section 302.225(4) of said act grants this power to said courts, and reads as follows:

> "The magistrate courts of each county and the circuit courts of the various counties of this state shall have power to suspend for the causes herein provided for a period not to exceed one year the license of any operator or

> chauffeur to operate a motor vehicle within the entire state, and any circuit court or magistrate court may revoke for the causes herein provided the license of any such operator or chauffeur to operate a motor vehicle within this state, whether the case is on appeal or has originated in such court."

Section 302.280 provides the causes for which an operator's or chauffeur's license shall be suspended. When a person is convicted in the magistrate court of an offense, where in connection with said conviction one of the causes is present as set out in Section 302.280, for which an operator's or chauffeur's license may be suspended, the court may order the license of such person suspended. Said section reads as follows:

> "1. The director shall suspend the license of an operator or chauffeur for a period of not to exceed one year, upon a showing by the records of the director or any public records that the operator or chauffeur
>
> (1) Has caused the death or personal injury of another or serious property damage by his wanton and reckless operation of a motor vehicle;
>
> (2) Is an habitual reckless or negligent driver of a motor vehicle;
>
> (3) Is an habitual violator of traffic laws;
>
> (4) Had been convicted by a magistrate or circuit court of unlawful or fraudulent use of such license;
>
> "2. The director shall suspend the license of any operator or chauffeur upon a showing by the records of the director or any public records that such operator or chauffeur has an unsatisfied judgment against him, as defined in chapter 303, RSMo 1949, until such judgment has been satisfied or the financial responsibility of such person, as defined in section 303.120, RSMo 1949, has been established."

In this connection we wish to emphasize that Section 302.280, supra, providing the causes for which operator's and chauffeur's licenses shall be suspended must not be read and interpreted alone, but only in connection with the provisions of Section 302.010, defining certain words and phrases used in the act, in order to give the former section its intended meaning.

Considering the authority of the director of revenue to suspend the license of an operator or chauffeur, Section 302.280, supra, providing for the cause for suspension is made applicable to the director of revenue. Thus, that section provides that "the director shall suspend the license of an operator or chauffeur for a period of not to exceed one year, upon a showing by the records of the director, or any public records, that the operator or chauffeur has an unsatisfied judgment against him, * * *."

When a conviction is obtained in a court relating to the operation of motor vehicles, a record of said conviction, together with other action which may have been taken by the court, is to be submitted to the director of revenue. It is so provided in Section 302.225(2), which section reads as follows:

> "Every court having jurisdiction over offenses committed under this chapter, or any other law of this state or municipal ordinance regulating the operation of vehicles on highways shall within ten days thereafter forward to the director upon forms to be furnished by the director a record of the conviction of any person in said court for a violation of any of said laws or ordinances other than non-moving traffic violations, together with the record of any action taken by the court in suspending or revoking the license of such person."

By compliance with the above section the director of revenue will have a record of causes for suspension as set out in Section 302.280, supra.

If from the information received from a court in connection with a conviction obtained therein, which becomes a record in the director of revenue's office, it appears that one or more of the causes for suspension exist, the director of revenue must suspend the license of the person in question even though no suspension was ordered by the court. We believe this action is required because of the mandatory character of Section 302.280, supra, as above quoted.

Your last conclusion is in regard to Section 302.225(5) and reads, "Apparently there is no provision made for the surrender of the suspended drivers license as there was in the old law. Please advise if this conclusion is correct."

Section 302.225(5), referred to above reads as follows:

> "Whenever any person is convicted of any offense in connection with which the court trying the person charged with the offense orders the suspension of the license of any operator or chauffeur to operate a motor vehicle, the court shall note the fact on the back of the license that the holder's right to drive a motor vehicle in such jurisdiction has been suspended for the period stated."

The provisions of this section do not require one convicted in a court having jurisdiction of an offense for which his operator's or chauffeur's license may be suspended and such license is ordered suspended, to surrender his license for the entire period of suspension, and neither does the court have the power under this section to order the surrender of the license for such period of time. However, the court does have the power and it is the duty to order the convicted person to turn over possession of his license for the purpose of making the notation on the back of the license, that said license had been suspended for the time specified thereon. After making the notation it is the further duty of the court to return the license to the holder. Therefore, your conclusion that Section 302.225(5) does not give the court power to order the surrender of the license for the suspension period is correct.

CONCLUSION

It is therefore, the opinion of this department that Section 302.170(3), RSMo 1949, was repealed by Amended Senate Committee Substitute for House Committee Substitute for House Bills No. 22, 49, 56 and 114 of the 66th General Assembly, which became effective January 1, 1952.

It is further the opinion of this department that under the provisions of Section 302.225(4) of above mentioned act, magistrate courts have power to order the suspension of operator's and chauffeur's licenses for causes provided in the act. That upon conviction of an offense in the magistrate court pertaining to the operation of motor vehicles, said court must report the conviction and suspension order, if one is made, to the director of revenue and provided by Section 302.225(2) of the act. Upon receipt of same, if one of the causes as provided in Section 302.280 appears to exist, it is the mandatory duty of the director of revenue to suspend the license for the period specified in the statute. Said court has no power to order the surrender

Honorable Raymond H. Vogel

of the license for the period of suspension, but under the provisions of Section 302.225(5) of said act, the court has the power, and it is his duty to order the surrender of the license so that it may be noted on the back of same, that said license has been suspended for the time specified therein, and that the holder's right to operate a motor vehicle for such period within the jurisdiction of the court has ceased. After making such notation the license must be returned to the holder, and the court cannot legally retain possession of it any longer.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PNC:hr

NONINTOXICATING BEER:
ELECTION DAYS:

The sale of nonintoxicating beer on election days by persons holding licenses to sell nonintoxicating beer is legal.

FILED
92

September 10, 1952

9-11-52

Honorable Earl L. Veatch
Prosecuting Attorney
Lewis County
Monticello, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

> "Would you kindly furnish us with an opinion on the following question:
>
> "May persons holding licenses to sell nonintoxicating beer under the provisions of Chapter 312, Missouri Revised Statutes 1949, sell or otherwise dispose of such nonintoxicating beer on election days?"

Paragraph 2 of Section 312.010, RSMo 1949, states:

> "The phrase 'nonintoxicating beer' as used in this chapter shall be construed to refer to and to mean any beer manufactured from pure hops or pure extract of hops, and pure barley malt or other wholesome grains or cereals, and wholesome yeast, and pure water, and free from all harmful substances, preservatives and adulterants, and having an alcoholic content of more than one-half of one per cent by volume and not exceeding three and two-tenths per cent by weight."

Honorable Earl L. Veatch

There is nothing in the nonintoxicating beer law of Missouri which prohibits the selling of nonintoxicating beer upon election days. Section 311.290, RSMo 1949, does prohibit the sale of intoxicating liquor upon the day of any general, special or primary election in this state, or upon any county, township, city, town or municipal election day. This, however, applies only to intoxicating liquor which, according to Section 311.020, RSMo 1949, is a beverage containing in excess of 3.2 per cent of alcohol by weight.

CONCLUSION

It is the opinion of this department that the sale of nonintoxicating beer on election days by persons holding licenses to sell nonintoxicating beer is legal.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

OFFICERS: The offices of mayor of a fourth class city and director of an incorporated fire district are compatible.

FILED
93

May 5, 1952

5-6-52

Honorable Stanley Wallach
Prosecuting Attorney
St. Louis County
Clayton, Missouri

Attention: Honorable L. L. Bornschein,
Assistant Prosecuting Attorney.

Dear Mr. Wallach:

This will be the opinion you recently requested on the subject of whether an elective official of a city of the fourth class, the mayor in the case you cite, can legally hold two elective offices, the other elective office being that of a director of an incorporated fire district, and receive compensation from each respective position.

Your letter requesting the opinion of this department reads as follows:

> "We have request for opinion from a local Municipality, a 4th Class City, on the subject of whether or not an elective official of such city, in this case the Mayor, can legally hold two elective offices, receiving compensation from each respective position; the other office involved is that of an elected Director of an incorporated Fire District (a political subdivision).
>
> "In this connection we note that the 1875 Constitution prohibited same but this was omitted in the 1945 Constitution. Further, there is nothing provided in the general or special laws governing Cities of the 4th Class as pertains to this subject.

> "We are hence of the opinion that the 1945 Constitution having omitted such restrictions that there is presently no limitation thereto nor legislation to date governing, and that person referred to herein can legally hold the two offices mentioned.
>
> "Kindly advise and oblige."

You state in your letter that it is your opinion that, since neither our present Constitution nor the statutes of this State prohibit one person from holding two such elective offices at the same time, such person can legally hold the two offices named. We agree with you under the following cited and quoted authorities:

Section 18 of Article IX of the Constitution of this State, 1875, expressly prohibited officers in cities or counties of more than 200,000 inhabitants from holding two municipal offices at the same time. Said Section 18 read as follows:

> "In cities or counties having more than two hundred thousand inhabitants, no person shall, at the same time, be a state officer and an officer of any county, city or other municipality; and no person shall, at the same time, fill two municipal offices, either in the same or different municipalities; but this section shall not apply to notaries public, justices of the peace or officers of the militia."

Article VII of our present Constitution deals with the subject of public officers and the requirements necessary to the holding of public office, but nowhere does Article VII carry over or adopt any of the provisions of said Section 18 of Article IX of the 1875 Constitution.

Article VI of the present Constitution of this State prescribes the fundamental law of the State respecting "local" government. In many of its sections said Article VI incorporates and adopts various other terms and provisions of Article IX of the 1875 Constitution, but no reference is made to nor is

any part of said Section 18 of Article IX of the said former Constitution of this State incorporated in said Article VI of our Constitution of 1945. The present Constitution ignores entirely the subjects and the provisions contained in Section 18, Article IX of the 1875 Constitution.

We have carefully searched legislative enactments since the adoption of our present Constitution respecting cities of the fourth class, but fail to find any statute, either general or special, relating to the government of cities of the fourth class by which an elective officer of cities of the fourth class is prohibited from holding two offices and receiving compensation from both positions at the same time.

It seems, therefore, conclusive that the holding of two offices by an elective officer of a city of the fourth class in this State is not prohibited or limited by either the present Constitution or the statutes of this State.

The holding of two offices at the same time by the same person was not prohibited by the common law. 46 C.J. 941, 942, states this rule as follows:

> "At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. * * * ."

The question arises here whether there is incompatibility between the performance of the duties of mayor of a city of the fourth class and the duties of a director of an incorporated fire district in a county of the first class. An incorporated fire district in St. Louis County, a county of the first class, is a political subdivision of the State by reason of the provisions of Sections 1 and 15 of Article X of the present Constitution of this State which when read together provide that the term "other political subdivision" shall be construed to include a "public corporation or public quasi-corporation having the power to tax." Section 321.230, RSMo 1949, under the subject of "Fire Protection Districts in Class One Counties", imposing upon such fire districts

the power to tax, reads as follows:

> "For the purpose of providing revenue for such districts, the board shall have the power and authority to order the levy and collection of ad valorem taxes on and against all taxable tangible property within the district, and to make timely demand and to sue for and collect any and all other taxes, contributions or allocations to which the district may be entitled."

Such incorporated fire district is not connected in any way whatsoever as a political entity with a city of the fourth class as a municipal entity.

A fire protection district is governed by a board of directors under the provisions of Chapter 231, RSMo 1949. The directors of such a district are elective officers. The first board of directors is elected at the time of the organization of the district to serve during deferred numbered years. Subsequent members of the board are elected thereafter as provided in Section 321.210, RSMo, 1949, to also serve for deferred numbered years. The several sections of said Chapter 231 provide the scheme and plan of creating, maintaining and operating a fire protection district, financially and from a governmental standpoint, having as its sole objective the protection of the district against fire by any available means.

The office of mayor of a city of the fourth class under Section 79.050, Chapter 79, RSMo 1949, is an elective office. The duties and powers imposed upon the mayor of a city of the fourth class in conjunction with the board of aldermen of such city are defined, generally, in Section 79.110, RSMo 1949. There are divers other specific duties imposed upon the mayor by the several other sections of Chapter 79 and of Chapter 98, RSMo 1949, respecting the government of a city of the fourth class. Such sections are too numerous and too lengthy to otherwise be referred to here. They will readily be found in the above-numbered chapters of the revision of our statutes for 1949.

Study of the sections of Chapter 321, relating to the organization and operation of fire protection districts and the duties thereunder imposed upon the members of the board of directors of such districts, and statutes providing the duties and powers imposed upon mayors of cities of the

fourth class in St. Louis County, Missouri, shows conclusively that there is no conflict or incompatibility in the performance of the duties of a mayor of a city of the fourth class and a director of a fire protection district in St. Louis County, Missouri. Neither of these corporate bodies would have any control or supervision over each other in any of their separate corporate affairs.

Our Supreme Court passed upon this question in the case of State ex rel. vs. Bus, 135 Mo. 325. In support of the text in 46 C.J. 941, 942, supra, in a case where the question before the Court was whether the duties of the office of deputy sheriff and those of a school director were so inconsistent and incompatible as to render it improper for one person (the respondent in an ouster proceeding in that case) to hold both offices. The Court, holding that the duties of the two offices were not incompatible and could be performed by the same person at the same time, stating the common law rule at l.c. 338, said:

> "* * * At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

Considering the premises and the authorities cited and quoted, the duties of a mayor in a fourth class city and the duties of a director of a fire protection district in St. Louis County, are not inconsistent or incompatible and can be both held by the same person at the same time, and that such person may receive compensation from each position while so occupying such offices.

CONCLUSION

It is, therefore, the opinion of this department that the office of mayor of a city of the fourth class in

Honorable Stanley Wallach

St. Louis County, Missouri, and the office of director of a fire protection district in St. Louis County, Missouri, may legally be held by the same person at the same time, and that such person so holding such elective offices may receive compensation from each respective position.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GWC:ir

HEALTH:
COUNTIES: County public health center operating under Chapter 205, RSMo 1949, has no express or implied power to purchase site for county garbage dump.

October 22, 1952 10/21/52

FILED
93

Honorable Wayne W. Waldo
Prosecuting Attorney
Pulaski County
Waynesville, Missouri

Dear Mr. Waldo:

The following opinion is rendered in reply to your request reading as follows:

> "The opinion of the Attorney General is respectfully requested on the following situation:
>
> "Pulaski County, Missouri has a one mill tax levy to 'establish, maintain, manage and operate a public health center'. Is it permissible for the Health Department of Pulaski County to purchase a tract of land situated in Pulaski County to be used as a County Dump Ground for rubbish, etc., at an expense of approximately $100.00? Can the Health Department of Pulaski County purchase a one half interest in a tract of land for such a purpose where the other half interest will be held by the City of Waynesville, Missouri? Can the money for the purchase of this land be taken from the money obtained under the one mill tax levy?
>
> "Where such a one mill tax levy exists, can Pulaski County take money from General Revenue, Class 5, to purchase land for such a purpose? Can Pulaski County take money from any fund or revenue of any kind for such a purpose?
>
> "The opinion of the Attorney General will be greatly appreciated on these questions."

Statutes governing the county public health center established in Pulaski county are found at Sections 205.010 to 205.130 RSMo 1949, as amended by repeal and reenactment disclosed in House Bill No. 307, passed by the 66th General Assembly of Missouri. The only provision of said law granting authority to the governing body of the county public health center to purchase sites of any kind is found in paragraph 4 of Section 205.042 RSMo 1949, as repealed and reenacted, which provides:

> "4. The board of health center trustees shall make and adopt such by-laws, rules and regulations for their own guidance and for the government of the county health center as may be deemed expedient for the economic and equitable conduct thereof. They shall have the exclusive control of the expenditures of all moneys collected to the credit of the county health center fund, and of the purchase of site or sites, the purchase or construction of any county health center buildings, and of the supervision, care and custody of the grounds, rooms or buildings purchased, constructed, leased or set apart for that purpose. All moneys received for the county health center shall be deposited in the county treasury to the credit of the county health center fund, and paid out only upon warrants ordered drawn by the county court upon properly authenticated vouchers of the board of health center trustees."

We find nothing in the language quoted from Section 205.042 which authorizes trustees of a county public health center to purchase a site to be used for a county dump ground. No facts are disclosed in the opinion request which lead us to believe that power to acquire a site for a county trash or garbage dump may reasonably be implied from the grant of power to establish the county public health center, and such presumption may not be indulged in the absence of such facts. The right to acquire a site for a trash dump necessarily involves a duty to provide such a service. This service involves acts done in the interest of public health and safety under properly delegated police power of the state. In 11 Am. Jur., Constitutional Law, Sec. 271, pp. 1020-1023, we find the following language:

> "One of the most important fields of legislation in which a state may enact measures under the police power is that of regulations in the interest of public

> health and safety. No exhaustive examination of all the matters which may be regulated under this object of the police power is practicable, but under it laws may be passed * * * providing for the collection and removal of garbage, refuse, and offal in thickly populated cities; and, in general, prohibiting the maintenance of any unsanitary condition which amounts to a nuisance."

The State of Missouri, by statute, has delegated police power to cities to enable such municipalities to deal with the important problem of garbage disposal, and such statutes clearly demonstrate that disposal of garbage and other refuse is a municipal function and not a county function. Section 71.680 RSMo 1949, applicable to cities of the second, third and fourth classes in this state, provides as follows:

> "In addition to all powers now possessed by cities of the second, third and fourth classes in this state for the protection of the public health, each city of the second, third, or fourth class of this state is hereby authorized and empowered to provide for the gathering, handling and disposition, either by itself, or by contract with others, for the gathering, handling and disposition of garbage, trash, cinders, refuse matter and municipal waste accumulating in such cities, and to pay for the same out of general revenues or by collection of charges for such service, and to do such other and further acts as may be deemed expedient for the protection and preservation of the public health, as such public health may be affected by the accumulation of trash, cinders, garbage, refuse matter and municipal waste; to acquire by purchase, construction, lease, gift or otherwise, within or without the corporate limits of such cities an incinerator or incinerators for the destruction of such garbage, trash, cinders, refuse matter and municipal waste; to acquire by any of such means all equipment necessary or expedient for use in the collection, handling and disposition of garbage, trash, cinders, refuse matter and municipal waste, to acquire by any of such means a purification plant or plants or sewage disposal plant

> for the purification of all sewage accumulating in such cities. Such incinerator or incinerators, equipment, purification plant or plants or sewage disposal plant, may be acquired by such cities with funds derived from the issue and sale of bonds in the manner provided by law for the issue and sale of bonds for other public purposes; or such may enter into contract for the construction or purchase of such incinerator or incinerators, equipment or purification plant or plants or sewage disposal plant to be paid for out of the general revenues of such cities in annual installments; provided, however, that the period of payment for any such incinerator or incinerators, equipment, purification plant or plants or sewage disposal plant, or any contract for the construction, purchase or lease thereof out of the general revenues of such cities shall not extend over a longer period of time than ten years."

In view of the language contained in Section 71.680, RSMo 1949, quoted above, which unquestionably makes the disposal of garbage and refuse a municipal function, and in the absence of any statute clothing a county public health center with authority to acquire sites for such a purpose, it must necessarily be concluded that no power exists in a county public health center, operating under the provisions of Chapter 205, RSMo 1949, as amended, to purchase a site for such purpose. Having so concluded, it is unnecessary to dispose of other questions posed in the opinion request.

CONCLUSION

It is the opinion of this department that a county public health center operating under the provisions of Chapter 205, RSMo 1949, as amended, is without express or implied authority to purchase a site to be used as a county dump ground for rubbish.

Respectfully yours,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:lw

COUNTIES OF FIRST CLASS: UNDER CHARTER FORM OF GOVERNMENT:
COUNTY CHARTER:
CONSTABLE'S SALARIES:
CONSTITUTION:(Secs. 18(e) and 18(b) of Article VI.)

Salaries of constables in St. Louis County are set by County Charter.

12-1-52

November 20, 1952

FILED
93

Honorable Stanley Wallach
Prosecuting Attorney
St. Louis County
Clayton, Missouri

Attention: Mr. Wm. J. Hough,
First Assistant Prosecuting Attorney

Dear Sir:

This will acknowledge receipt of your recent request for an opinion of this office, the pertinent part of said request is as follows:

> "Would you kindly advise this office as to whether or not the County Counsel of St. Louis County can increase the salaries of Constables in the four districts within St. Louis County or whether it would be necessary to have legislative enactment to increase the salaries."

We believe that statute involved in the proposition set forth to be Section 63.085, RSMo 1949, (Cumulative Supplement, 1951). Said section reads as follows:

> "Compensation of constable--deputies, number and compensation (St. Louis county).--In all counties of the first class operating under a charter form of government the constable elected hereunder shall receive a salary of three hundred dollars per month plus fifty dollars per month transportation allowance, payable at the end of each month out of the treasury of such county. Every Constable shall have power to appoint not to exceed eight deputies, when authorized by order of the county court, for whose conduct he shall be answerable and such appointments shall be in writing, and said appointments shall be filed, in the office of the clerk of the county court of such county. Such deputies shall receive a salary of two hundred dollars per month plus

> fifty dollars per month transportation allowance, to be paid out of the county treasury of such county, in like manner as provided herein in cases of constables."

This, of course, is an attempt by the Legislature to set the salary and transportation allowance of constables in counties of the first class operating under charter form of government.

It is our opinion that this enactment is unconstitutional and void in view of Section 18(e), Article VI, Missouri Constitution of 1945, which reads as follows:

> "Sec. 18(e). Laws Affecting Charter Counties--Limitations. Laws shall be enacted providing for free and open elections in such counties, and laws may be enacted providing the number and salaries of the judicial officers therein as provided by this Constitution and by law, but no law shall provide for any other office or employee of the county or fix the salary of any of its officers or employees."

The above set out section strictly limits the Legislature so that it may only pass laws "providing for free and open elections" and "providing the number and salaries of the judicial officers therein" and further that the Legislature shall pass no law that "Shall provide for any other office or employee of the county or fix the salary of any of its officers or employees." Therefore the Legislature can only pass laws relating to elections and the number of judicial officers and their salaries in first class counties under charter form of government.

Section 18(b), Article VI of the Constitution of Missouri, 1945, reads as follows:

> "Sec. 18(b). Provisions Required in County Charters.--The charter shall provide for its amendment, for the form of the county government, the number, kinds, manner of selection, terms of office and salaries of the county officers, and for the exercise of all powers and duties of counties and county officers prescribed by the Constitution and laws of the state."

The above section provides that the "Charter" of counties under charter form of government shall provide for "salaries of the county officers."

A constable does not hold a judicial office. Queatham v.

Hon. Stanley Wallach

Modern Woodmen of America, 148 Mo. App. 33, 127 S.W. 651, State ex rel. Heimburger v. Wells, 210 Mo. 601, 109 S.W. 758. Therefore, he is a county officer whose term of office and salary should be provided for in the county charter.

CONCLUSION

It is, therefore, the opinion of this department that Section 63.085, RSMo 1949, (1951 Cumulative Supplement) is unconstitutional and void as being violative of Section 18(e) Article VI, Constitution of Missouri, 1945, supra, in charter counties of the 1st class; that the charter in these counties shall provide for the office of constable, manner of his selection, term of office and salary in accordance with Section 18(b), Article VI, Missouri Constitution, 1945, supra.

Respectfully submitted,

A. BERTRAM ELAM
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

Savings and Loan Associations:) Savings and Loan Association subject to provisions of Chap. 369, RSMo, 1949, may not amend charter to vest power in board of directors to make, amend, alter and repeal by-laws.

FILED
94

August 19, 1952 8-22-52

Honorable Clarence Webb, Supervisor
Division of Savings and Loan Supervision
Department of Business and Administration
Jefferson City, Missouri

Dear Mr. Webb:

In your letter of April 16, 1952, you requested a formal opinion from this department relative to corporate powers of savings and loan associations operating under the provisions of Chapter 369, RSMo, 1949. The initial request for an opinion has been clarified by additional correspondence sent to this department at your insistence and the question to be ruled by this opinion is restated as follows:

> "May a savings and loan association organized in Missouri and operating by virtue of the provisions contained in Chapter 369, RSMo, 1949, amend its articles of agreement so as to provide that the power to make, alter, amend and repeal its by-laws shall be vested in the association's board of directors?"

Section 369.120, RSMo, 1949 provides:

> "1. Any amendment to the by-laws which is to be offered at any meeting of the members shall first be filed with the supervisor not less than fourteen days prior to the date of such meeting.
>
> "2. If the supervisor has any objection to the proposed amendment, he shall give written notice of such objection to the chairman of the board of directors and president within seven days after receipt of such proposed amendment, which objection shall be read and available for inspection at the meeting of the members.

> "3. No amendment to the bylaws shall become effective until same is approved by the supervisor as practically and financially sound.
>
> "4. The supervisor shall be notified of any amendment to the bylaws within ten days after adoption and unless he shall disapprove of such amendment within twenty days, same shall stand as approved by him."

The section just quoted clearly discloses that any amendment to the by-laws of a savings and loan association must ultimately be submitted to the members of the association before it can become a binding rule on the association's members. It appears on its face to vest exclusive power in the stockholders to pass on amendments to by-laws, subject of course to having the same approved by the savings and loan supervisor. Consequently, we find the basic law of savings and loan associations, Chapter 369, RSMo, 1949, clear and distinct on the proposition of amending by-laws. The serious question to be disposed of is whether the stockholders may amend the original charter of the association so as to give the board of directors sole authority to make, alter, amend and repeal all by-laws of the association.

On the subject of amendment of a charter of a building and loan association we find the following language in Sundheim's "Building and Loan Associations," Third Edition, Section 38:

> "The charter of an association can be changed by legislative enactment, as practically all the states reserve this right in their constitutions and statute law. It may also be amended by proper application to a judicial or ministerial authority, in accordance with the law of the state that created the association. Thus, the name of the association, the term for which it is to exist, the number of directors, and the amount of the capital stock are examples of changes frequently made. The statutes of the various states prescribe the amendments which may be allowed, and they must be such as are authorized by law at the time the application is made, and the application must be made by the stockholders."

In addition, we find the subject of charter amendment of a building and loan association discussed in the following language from Thompson on "Building Associations", Second Edition, Sec. 28:

> "The power to amend presupposes legislative authority, and all powers rightfully exercised by corporate bodies being conferred by the government either in express terms or by clear implication, authority for their corporate acts must be found in the grant or in the requirement of some legislative act."

Examination of the statutes found in Chapter 369, RSMo, 1949, relating to savings and loan associations has not brought to light any provision disclosing that a charter of such an association may make provision whereby the directors of the savings and loan association may be given power to make, alter, amend and repeal all by-laws. It seems clear to us that such a statutory provision would be repugnant to the letter and spirit of language contained in Section 369.120, RSMo, 1949, cited above.

CONCLUSION

It is the opinion of this department that a savings and loan association organized in Missouri and operating by virtue of the provisions contained in Chapter 369, RSMo, 1949, does not have authority to amend its articles of agreement so as to provide that the power to make, alter, amend and repeal its by-laws will be vested in the association's board of directors, rather than in its stockholders.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. Taylor
Attorney General

JLO'M:lw

BONDS:)
)
SEWER BONDS:)
)
ELECTIONS:)

(1) Water-Sewer Revenue Bonds authorized by House Bill No. 45, 1951, need not be offered for public sale; (2) and need only a four-seventh vote.

FILED
94

October 31, 1952

11-18-52

Mr. C. E. Watkins
I.O.O.F. Building
Memphis, Missouri

Dear Sir:

This is in reply to your request for an opinion, which is as follows:

> "Yesterday we had an election to vote for a swimming pool, it was defeated. At the same time we voted for Water-Sewer Revenue Bonds, attached is an explanation. This water-sewer proposition carried by a small majority, it is something that we really need.
>
> "Please advise me if it is necessary to advertise these bonds for sale to the highest bidder, the same as is required where the bonds are retired by taxation. A few years ago we voted a bond levy of $87,500.00-2%, a certain percent of it maturing every year. These bonds were sold and never offered for sale publicly. It is my opinion that the Revenue Bonds that I refer to should be advertised for sale. I, personally, would appreciate your opinion in the matter. Also I am of the opinion that Revenue bonds of this nature (they not being a levy on real estate) do not require a two-thirds majority. Am I correct or not?"

The legislation authorizing the issuance of water-sewer bonds was enacted by the Sixty-sixth General Assembly

by House Bill No. 45. In addition to the several sections providing for the authorization and issuance of the said bonds, the Legislature included a section giving the legislative intent as to the construction of the law by Section 250.250, RSMo Cum. Supp. 1951,(H.B. 45, Section 24) which is as follows:

> "This chapter shall be construed as a cumulative and additional grant of power to cities, towns and villages and shall not be construed to repeal or modify any other act or statute nor shall it be construed to repeal or modify any power granted by the constitution or statutes of the state of Missouri or by any special charter or constitutional charter. This chapter, without reference to any other chapter, shall be deemed sufficient authority for the exercise of any powers granted herein, and all powers necessary to effectuate the purposes of this chapter shall be deemed to be granted hereby."

Section 250.080(6), RSMo Cum. Supp. 1951, provides for the method by which the sale of the bonds is to be conducted and is as follows:

> "Any such bonds shall be sold in such manner and upon such terms as the governing authority of the said town, city or village or the board of trustees of such sewer district shall determine, but such bonds shall not be sold for less than ninety cents on the dollar nor shall they be sold at such a price that the interest cost upon the actual proceeds of such bonds from the date thereof to their maturity shall exceed six per cent per annum. Such ordinance or resolution may provide that certain bonds authorized thereby shall be junior or subordinate in any or all respects to other revenue bonds authorized concurrently therewith or prior to or after such bonds."

Mr. C. E. Watkins

Since the above-quoted section gives the governing authority of the subdivision issuing the bonds full authority to determine the manner and terms of the sale of the bonds, we believe that that section is applicable to this sale, and that since there is no provision in House Bill No. 45 for advertising the bonds there is no necessity for such an advertisement.

You further ask if revenue bonds of this nature require a two-thirds majority. Section 250.070(1), RSMo 1949, Cum. Supp. 1951, provides that the proposition put before the voters to issue such bonds shall require the assent of four-sevenths of the qualified voters of the city, town or village or sewer district who shall vote on the proposition. Since a four-sevenths vote is provided for by statute, a two-thirds majority is not necessary. This provision for a four-sevenths vote is also contained in Article VI, Section 27 of the Missouri Constitution of 1945.

CONCLUSION

Therefore, it is the opinion of this department that (1) water-sewer bonds need not be sold at a public sale but shall be sold in such manner and upon such terms as the governing authority shall determine, and (2) the proposition need only receive the assent of four-sevenths of the qualified voters of the subdivision proposing to issue the bonds.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JRB/fwh

TAXATION:
SCHOOLS:

In computing the average school levy for railroads and other public utilities all districts including fractional districts partially within the county should be considered. If there has been a partial failure to levy school taxes, such may be carried in a supplemental tax book and collected as other taxes.



November 18, 1952

11-18-52

Mr. Charles A. Weber
Assistant Prosecuting Attorney
Ste. Genevieve, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office, which request reads as follows:

> "For some years in this County (Ste. Genevieve) there seems to have been some discrepancy between the annual calculations made by the County Superintendent of Schools and the amount of tax that was actually turned over to him for school purposes. In determining the annual calculations, the Superintendent of Schools used all districts, including fractional districts with schools outside of the County. Through this same method, the board arrived at the estimate in determining the average levy for railroads and other public utilities. However, when these utilities were assessed, the average levy was somewhat lower than the amount called for in the estimates presented to the County Court by the School Board.
>
> "I have read an opinion given by your office in 1946 which in part states that the estimates given to the County Court by the School Board are final and cannot be altered or changed by the County Court.
>
> "The question, however, is this. 'In determining the average levy, as set out in the estimates, should the board arrive at this figure by using all districts, including fractional districts with schools outside the County?'

> "If the answer to this interrogative is in the affirmative, and an arbitrary levy was used in determining an average rate, will an action lie against these utilities for the difference in the amount that they should have paid and the amount that was actually paid? If an action will lie, what is the basis for this action?"

Your first question would appear to be as follows:

How is the rate of taxation for school purposes to be levied against railroads and public utilities determined? This question is purposely phrased in broad terms to include your specific question as to whether school districts lying partially within the county should be considered in arriving at the average rate.

Since the rate of taxation of railroads for school purposes depends upon the local rate of taxation within the districts we will here set out how this local rate is determined.

Section 165.077, RSMo 1949, requires the board of directors of each school district to forward to the county superintendent of schools an estimate of the amount of money to be raised by taxation to sustain the school or schools for a specified period and the rate required to produce said amount. Said section reads as follows:

> "The board of directors of each school district shall, on or before the fifteenth day of May of each year, forward to the county superintendent of schools an estimate of the amount of money to be raised by taxation for the ensuing school year, and the rate required to produce said amount, specifying by funds the amount and rate necessary to sustain the school or schools of the district for the time required by law or authorized by the qualified voters of the district, to meet principal and interest payments on the bonded debt of the district, and to provide such funds as may have been ordered by the qualified voters of the district for other legitimate district purposes, including the purchase of school building sites, buying or erecting school buildings, repairing and furnishing such buildings, and providing foot bridges across running streams."

The duties of the county superintendent of schools upon receipt of such estimates is specified in Section 167.040, RSMo 1949, as follows:

> "* * *he shall receive, and, if properly made, approve estimates and enumeration lists and turn same over to the county clerk; * * *."

The county superintendent of schools under this section has no power to make estimates or fix tax rates but his power only extends to approving the estimates if properly made, and then to turn them over to the county clerk. The duties of the county clerk on receiving the estimates from various districts is set out in Section 165.083, RSMo 1949, and reads in part as follows:

> "Upon receipt of the estimates of the various districts, the county clerk shall proceed to assess the amount so returned on all taxable property, real and personal, in each district, as shown by the last annual assessment for state and county purposes, including all statements of merchants in each district of the amount of goods, wares and merchandise owned by them and taxable for state and county purposes; provided, the levy thus extended shall not exceed in any one year the following rates on the hundred dollars assessed valuation; * * *."

From the foregoing it is seen that the rate of taxation for school purposes within a district is fixed by the district board with specified limits approved by the county superintendent of schools and such taxes levied by the county clerk.

In regard to districts lying partly within the county, we refer you to Section 165.190, RSMo 1949, which provides that the same procedure as above outlined is true in regard to such partial districts, except that the estimates are turned over directly to the county clerk by the clerk of the school district and need not be approved by the county superintendent of schools. The county lcerk would then proceed to levy a tax upon that portion of the district within the county in the same manner as where the district lies wholly within the county.

Section 165.190 reads in part as follows:

> "4. In all school districts divided by county lines it shall be the duty of the clerk of such school district to report to the clerk of each county in which such district is in part located the number of persons of school age residing in that part of said school district lying within the respective counties, together with the amount of money necessary to maintain the school, and such other funds as it is necessary to raise by taxation in the same manner as is provided in districts not so divided. And it shall be the duty of the county court and county clerk of each county in which such district is located to apportion to said district such part of the

> public school funds as the enumeration of such parts of said district shows it to be entitled to, and all moneys collected for school purposes as taxes on property within such district shall be paid to said district the same as if it lay entirely within one county."

The rate of taxation of railroads and utility companies for school purposes is wholly within the jurisdiction of the county court. Section 151.150 reads in part as follows:

> "1. For the purpose of levying school taxes, and taxes for the erection of public buildings, and for other purposes, in several counties of this state, on the roadbed, rolling stock and movable property or railroads in this state, the several county courts shall ascertain from the returns in the office of the county clerk the average rate of taxation levied for school purposes, and also the average rate of taxation levied for the erection of public buildings, and for other purposes, each separately, by the several local school boards or authorities of the several school districts throughout the county.
>
> "2. Such average rate for school purposes shall be ascertained by adding together the local rates of the several school districts in the county and by dividing the sum thus obtained by the whole number of districts levying a tax for school purposes, and shall cause to be charged to said railroad companies taxes for school purposes said average rate on the proportionate value of said railroad property so certified to the county court by the state tax commission, under the provisions of this chapter, and the said clerk shall apportion the said taxes for school purposes, so levied and collected, among all the school districts in his county, in proportion to the enumeration returns of said district."

* * * * * * * * * * * * * *

Section 153.030, RSMo 1949, provides that utility companies shall be taxed in the same manner as provided by law for the taxation of railroads therefore, such companies will be treated and considered along with the railroads.

Under Section 151.150, supra, the average rate of taxation of railroads and utility companies is computed by adding together the rate of taxation of each of the several school districts levying a

tax under Section 165.077 and 165.083 and dividing the total by the number of districts. We are of the opinion that in arriving at the sum of the tax rates, the tax rate, as computed in a portion of a district lying partially within the county should be included, and the district lying partially within the county should be included in the total number of districts in arriving at the average rate. Only in this way can an average rate be established for all districts or parts thereof within the county and only in this manner could the tax rate be equalized throughout the county.

To be sure the average rate thus established will be less than the local rate for school purposes in some districts, such is the inevitable result of such a computation. However, the method of computation as outlined in Section 151.150 is mandatory and a discretionary rate of taxation cannot be adopted.

Assuming that a rate of taxation of railroads and utility companies was established other than under the above outlined procedure and was less than the rate which would have been obtained under the correct method, you next inquire if an action will lie against the railroads and utility companies for the amount they should have paid. In answer to this inquiry we refer you to Section 137.300, RSMo 1949, which provides that if there has been a failure to levy school taxes, or any portion thereof, the same may be listed in a supplemental tax book and collected as other taxes. Said section provides as follows:

> "When for any cause there has been a failure to levy the state, county, school or other taxes, of any portion thereof, or to extend and authenticate the same for the use of the collector, or to make out and deliver to the collector a proper tax book for the collection of the same, as required by law, in any county for any year or years, the clerk of the county court of such county for the time being, when so required for such state taxes by the state tax commission, and for such county, school or other taxes by the county court, shall make a supplemental tax book for such year or years. Such supplemental tax book shall be made upon the assessments for the year or years for which the taxes should have been levied, or where there has been a failure to assess the property, upon the assessment made as required by section 137.295, the taxes for each year to be in a separate book and to be levied for such state, county, school and other taxes, or portions of the same, as had failed to be levied and collected at the proper time. In making said supplemental tax book, and in all subsequent proceedings thereon, the

> county court, clerk of the same and the collector shall be governed by the same law as is now or at the time then being or may be in force for the same duties, and shall receive the same compensation as is now or at the time then being or may be provided by law for similar duties; provided, that whenever such taxes or any portion of them shall have been paid upon defective or illegal tax books, the amounts so paid shall not be charged in such supplemental tax books, and when any such taxes have been paid in full upon any property, the same, with the description of the said property and the name of the owner thereof, shall be omitted from such supplemental tax book."

CONCLUSION

Therefore, it is the opinion of this department in arriving at the average rate of taxation of railroads and utility companies the rate of taxation in portions of school districts lying partially within the county should be considered.

We are further of the opinion that in the event that there has been an erroneous levy of taxes against railroads and utilities for school purposes due to an erroneous computation of the rate of taxation and such levy was less than that which should have been collected, the difference may be carried in a supplemental tax book as provided in Section 137.300 and collected as other taxes.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DDG:hr

SCHOOLS: School board authorized to construct school building without entering into formal contract for same. School board could make direct purchases of materials needed and employ necessary labor to do the work.

PUBLIC BUILDINGS:

FILED
96

February 20, 1952 3-4-52

Mr. Hubert Wheeler
Commissioner of Education
Department of Education
State Capitol Building
Jefferson City, Missouri

Dear Sir:

Your letter at hand requesting an official opinion of this department, which reads as follows:

> "This Department has received inquiries about the laws of this state applicable to powers of the Board of Education in the erection and construction of school buildings. During this period of inflated costs it is very difficult and in some cases impossible to secure a contract for the erection of school buildings that would come within the available funds of the district. The laws of this state limit school district bond indebtedness to a maximum of 5 percent of the assessed valuation which for many districts does not permit the raising of enough money to properly construct school buildings. Because of these conditions school boards are often forced to find a more economical way of providing necessary school building facilities to meet the requirements of the district. Sometimes it is possible for the school board to employ a local person at a reasonable wage to supervise the erection of the school building, employ local labor, and buy its materials from whatever source available. Such a plan would not require any formal contract.

This plan seems to be the only means that some school boards have for providing schoolroom facilities.

"Section 8.250 RSMo 1949 provides in part that no contract shall be made for the erection or construction of any building, improvements, or repairs, the cost of which shall exceed the sum of $10,000, until public bids therefor are requested by advertising as set out in this act. In your Opinion of June 30, 1950 to the prosecuting attorney of Camden County it was held this law applies to boards of education of public school districts. There seems to be no question about the plain meaning of this act as far as contracts are concerned. This act does not seem to indicate that it would be necessary or mandatory that the board of education issue a formal contract for the erection and improvement of school buildings. The act seems to say that any contracting that exceeds the cost of $10,000 must be advertised but does not seem to contain any regulations governing the board of education where contracts are not let.

"I shall be glad to have your advice and official opinion in regard to the following questions:

"1. Does a board of education have authority to carry on a school building program, whatever cost may be involved, without issuing a formal contract for the construction of the building improvements?

"2. If the cost of a school building construction should exceed $10,000 and the board advertised for public bids as indicated in the law but could not secure satisfactory bids that would come within the available funds of the district, would the school board have the privilege of constructing the building without issuing a formal contract, but by using local labor and purchasing materials wherever available?"

At the outset, we might point out that a school district, acting through its board of directors, is authorized to erect school buildings and to build additions and make repairs to those in existence. To accomplish this, the board of directors of a school district is authorized to borrow money and issue bonds in the manner provided by law. Thus Section 165.040, RSMo 1949, in part, provides:

> "For the purpose of purchasing schoolhouse sites, erecting schoolhouses, library buildings and furnishing the same, and building additions to or repairing old buildings, the board of directors shall be authorized to borrow money, and issue bonds for the payment thereof, in the manner herein provided. * * *"

Given this power, the questions which you have presented generally ask how the board of directors of a school district should exercise it in carrying out a building program, in view of the provisions of Section 8.250, RSMo 1949, providing as follows:

> "No contract shall be made by an officer of this state or any board or organization existing under the laws of this state or under the charter, laws or ordinances of any political subdivision thereof, having the expenditure of public funds or moneys provided by appropriation from this state in whole or in part, or raised in whole or in part by taxation under the laws of this state, or of any political subdivision thereof containing five hundred thousand inhabitants or over, for the erection or construction of any building, improvement, alteration or repair, the total cost of which shall exceed the sum of ten thousand dollars, until public bids therefor are requested or solicited by advertising for ten days in one paper in the county in which the work is located; and if the cost of the work contemplated shall exceed thirty-five thousand dollars, the same shall be advertised for ten days in the county paper of the county in which the work is located, and in addition thereto shall also be advertised for ten days in two daily papers of the state having not

> less than fifty thousand daily circulation; and in no case shall any contract be awarded when the amount appropriated for same is not sufficient to entirely complete the work ready for service. The number of such public bids shall not be restricted or curtailed, but shall be open to all persons complying with the terms upon which such bids are requested or solicited."

The courts have heretofore had occasion to construe statutes of a similar character.

In the case of Home Building & Conveyance Co. v. City of Roanoke, 91 Va. 52, 20 S.E. 895, suit was instituted to enjoin the city from erecting approaches to a certain bridge. The city was undertaking to construct the bridge approaches under direction of its own engineers and officers, and it was contended that such a procedure was in violation of a certain section of the city charter requiring all contracts for the erection of public improvements to be let to the lowest responsible bidder after giving notice by the city council and complying with other provisions of the charter relative to the letting of contracts. In ruling that the city was authorized to construct the particular improvement under the direction of its own engineers and officers the court, at S.E. l.c. 899, said:

> "It is, however, contended by appellant that because section 50 of the charter of Roanoke requires all contracts for the erection of public improvements or buildings within the jurisdiction of the city council to be let to the lowest responsible bidder, after notice, etc., all the acts and doings of the city in connection with the building or construction of the bridge approach in Randolph street are manifestly contrary to law and illegal, - ultra vires.
>
> "We see nothing in that clause of the charter which inhibited the city from constructing public buildings or improvements under direction of its own engineers and officers. It simply provides that when such buildings or improvements are let to contract, it shall be to the lowest bidder, and after advertisement, as provided. Any other construction of that provision would prove dangerous, if not injurious, to any

> city, since we see from this record that, if that construction had been followed, the approaches to the overhead bridges in the city of Roanoke would have cost the city $8,000 or $10,000 more than they will under the mode of construction adopted by the city."

In Perry v. City of Los Angeles, 157 Cal. 146, 106 P. 410, suit was instituted to enjoin the officers of the city of Los Angeles from proceeding with the construction or completion of a certain public work's improvement involving an aggregate expenditure of more than $500.00 in any other way than by letting the same by contract to the lowest bidder in the manner prescribed by the charter of the city in the letting of contracts. The particular public work's improvement was a sewer. The charter provision provided that all contracts for the construction or completion of any public work's improvement shall be let to the lowest responsible bidder in the manner therein prescribed. The particular charter provision then set forth a method of obtaining bids. There was also another charter provision providing that all contracts involving an expenditure exceeding $500.00 had to be in writing. As the court pointed out in deciding the case, the real question to be determined was whether the city could itself do such work without letting any contract therefor; in other words, by day labor, under the authority and control of the city by its board of public works, and purchasing such material as it may require therefor. In ruling on the question the court, at S.E. l.c. 412, declared:

> "Provisions of the character of those contained in the Los Angeles charter are manifestly different from provisions requiring work to be done by contract, or to be let to the lowest bidder. According to the ordinary acceptation of the term 'doing work by contract,' it means the letting of the work, or some portion thereof, to some one who agrees to deliver the same completed for a specified price, and does not include the case of one who himself constructs an improvement by means of materials purchased directly by him and artisans and laborers directly employed and paid wages by him. Although the latter is doing the work by contract in the sense that he sustains a contractual relation to every artisan and laborer employed, and to every

materialman from whom he purchases materials, he is not doing the work by contract in the sense in which that term is commonly accepted either by laymen or lawyers. The general legislative recognition that this meaning is to be given to the term is shown by numerous acts, to some of which we have referred, and many freeholders' charters clearly show the same recognition. Of course, where a statute or charter declares that any work must be let to the lowest bidder, there is no possible basis for any other construction than one making bids and contracts imperative. The omission from the Los Angeles charter of any such provision as either of those discussed is most significant. If it had been intended to require that whenever a proposed improvement would cost more than $500, the work must be done 'by contract' let to the lowest responsible bidder, it would have been the simplest matter in the world to say so in plain terms, as has been said over and over again in other acts and charters. The failure to do so indicates that the framers of these charter provisions were guarding solely against the method of letting contracts for public work otherwise than to the lowest responsible bidder, after public notice of the work to be done thereunder; the object being to prevent favoritism in the matter of letting contracts and the payment of a greater price than the work was reasonably worth. There is nothing in the language used to indicate that it was designed to prevent the doing of the work by the city itself through the officers having such work in charge. The doing of the work being expressly authorized, and the board of public works being expressly given charge of the construction thereof, the power to construct otherwise than 'by contract' exists, unless the necessary implication of sections 148 and 207 of the charter is such as to prohibit such method. We are of the opinion that we would not be warranted in holding that these sections do imply any such prohibition. * * *"

Again, in the case of Boecking v. City of Oklahoma City, 162 Okla. 104, 19 P. (2d) 1082, the court was considering an injunction suit wherein it was sought to enjoin the city from entering into a contract with a sand and gravel company for the furnishing of a quantity of concrete to be used in the construction of a sedimentation basin. The plaintiff was contending that the total cost of the erection of the sedimentation basin would exceed $300.00; that the city proposed to construct the basin by labor employed directly by it, and without advertising and securing bids for the entire job. It was contended that this was in violation of a particular city charter provision providing that all contracts pertaining to public improvements involving an outlay of $300.00, or more, shall be entered into only after advertising for competitive bids in the manner prescribed in the charter provision. In deciding the case in favor of the city the court, at P. (2d) 1083, 1084, said:

> "The only question then presented is whether the city may, under the provisions of its charter, construct or erect public improvements or work of the nature here involved where the total cost thereof exceeds $300, by the use of labor employed directly by the city and without advertising for competitive bids therefor.
>
> "Charter and statutory provisions of this and similar nature are generally upheld. But a clear distinction is made between provisions which require all public work of such nature, exceeding in some cases a certain amount in costs, and provisions which require only that all contracts for such improvements, etc., to be advertised for competitive bids and award accordingly.
>
> * * * * * *
>
> "Defendant cites Perry v. City of Los Angeles, 157 Cal. 146, 106 P. 410. The charter of that city provided: 'All contracts for construction of public work or improvements or for furnishing labor and materials therefor, as herein provided, shall be let to the lowest responsible bidder.' The charter then prescribes the method of obtaining bids. It was there held that such provision should not be

> construed as prohibiting the doing of public work by the city itself by day labor. In that case a number of cases above referred to are cited and distinguished.
>
> "To the same effect is Home Building & Conveyance Co. v. City of Roanoke, 91 Va. 52, 20 S.E. 895, 27 L.R.A. 551.
>
> "In 19 R.C.L. 1069, the rule is stated as follows: 'A statutory provision that all contracts for public improvements shall be let to the lowest bidder does not prevent a municipal corporation from constructing such a work through its own engineers and officers.'"

In the case of Cooper v. City of Detroit, 222 Mich. 360, 192 N.W. 616, suit was brought to restrain the city from proceeding in the erection of a municipal garage without first having complied with the city charter relative to the letting of contracts to the lowest responsible bidders. The charter provision, in part, provided that no contract for the construction of any public building, the expense of which would exceed $500.00, should be let or entered into except with the lowest responsible bidder. The charter provision further provided the manner of giving notice calling for bids. In ruling in favor of the city the court, at N.W. l.c. 618, said:

> " * * * If the framers of the charter had intended that, when the cost of construction exceeded $500, all work should be done by contract, they undoubtedly would have said so in express terms. The omission of any definite method of doing the work would indicate that they intended to leave something to the discretion of the officials who had it in charge.
>
> * * * * *
>
> "We find nothing in the charter of the city of Detroit which expressly or by implication prevents the city from using its own forces in performing the labor necessary for the construction of its municipal garage, though the cost of such labor should exceed $500. The city of Detroit has the power under its charter to construct public works

> or improvements where the amount to be expended exceeds $500 without the letting of contracts for the work. It may do such work with its own forces under the direction and control of the commissioner of public works."

In the case of Contracting Plumbers' Ass'n v. Board of Education of St. Louis, 238 Mo. App. 1096, 194 S.W. (2d) 731, a taxpayer's suit was instituted against the members of the board of education and the commissioner of school buildings to compel them to do all repair, alteration and construction work on St. Louis school buildings where the cost exceeded $50.00, or $100.00 in cases of emergency, through contracts made after advertisements and public lettings. Section 10733, R.S. Mo. 1939, in part, provided that all contracts for the erection, repair and alteration of school buildings exceeding the amount of $50.00 shall be made by the board of education, after public letting, to the lowest responsible bidder complying with the terms of the letting. In cases of emergency, such contracting was permitted where the cost did not exceed the sum of $100.00. In deciding the question the court, after citing and quoting the cases hereinabove cited, affirmed the judgment of the circuit court which ruled favorably to the board of education. At S.W. l.c. 735, 736, the St. Louis Court of Appeals said:

> "It appears to be the generally accepted rule that in the absence of a requirement to that effect, a municipality need not let public work to contractors, but may do it through its own officers, and that a charter provision requiring all contracts for public improvements to be let to the lowest responsible bidder does not prohibit the municipality from constructing the improvements under the direction of its own engineers and officers.
>
> "In the present case plaintiffs would have our statute read that all repairs and alterations costing more than fifty dollars, or more than a hundred dollars in cases of emergency, must be made by contract after public letting to the lowest responsible bidder. But that is not the way the statute reads. It is not the function of the court to rewrite it.

"The judgment of the circuit court should be affirmed. The Commissioner so recommends."

In the above-cited cases it seems that the courts have recognized a distinction existed between two general types of statutes or laws providing for the manner in which official bodies are to proceed in carrying out a public building or improvement program.

In other words, some statutes, charter provisions or laws, in effect, provide that all work to be performed must be let to the lowest bidder or must be done by contract. If such is the case, there is no discretion invested in the official body in carrying out the building or public improvement program, and it can only be done by contract.

In the other class of statutes, charter provisions or laws, it is merely provided that all contracts for the erection or improvement of public works or buildings involving an expenditure over a certain amount shall be let to the lowest and best or responsible bidder after advertising for competitive bids; or it may be provided that no contract shall be let until after advertising, as provided by the law.

We believe that Section 8.250, supra, falls within the last general classification. That is to say, the statute merely provides, in part, that no contract shall be made for the erection, improvement, alteration or repair of any building, the total cost of which shall exceed $10,000.00, until public bids are requested by advertising in the manner provided.

It is our thought that the effect of the statute is to require the officer, board or organization, whichever the case may be, to do certain things or follow a certain procedure if it elects to carry out a building or improvement program by contract, the cost of which will exceed $10,000.00. In other words, if the official body desires to enter into a contract with a contractor who is to perform all of the construction work in connection with the building program, the provisions of the statute must be complied with.

However, the statute does not deprive the official body from exercising a discretion to carry out its building program under its own supervision and control by purchasing the necessary materials and directly employing the required labor in the manner which you have indicated.

To permit a school board or other official body to conduct a building program in such a manner would certainly be justified when an appreciable decrease in the cost would result. The Supreme Court of Virginia, in effect, so stated in the City of Roanoke case.

We therefore construe Section 8.250, supra, to only be applicable in the case of a school board carrying out a building program when the school board elects to enter into a formal contract for the construction of the building or improvements.

We further conclude that the school board would have the authority to carry out such building program without entering into a formal contract by making direct purchases of the required materials and directly employing the necessary labor and supervisory personnel to do the work.

In view of the foregoing we are constrained to answer both questions submitted in the affirmative. In connection with question No. 2, where the school board had advertised for public bids and the bids submitted exceeded the amount of funds available, the school board would be prohibited from contracting with any of the bidders by Section 8.250, supra, for it, in part, provides that "in no case shall any contract be awarded when the amount appropriated for same is not sufficient to entirely complete the work ready for service." Certainly, in such an instance the school board would be justified and authorized to carry out the building program in the other manner, as above stated.

In answering the questions presented in your request that which we have said is with reference to school boards generally within the state. However, we might point out that since the court's decision in the Contracting Plumbers' Ass'n Case, supra, wherein Section 10733, R. S. Mo. 1939, was construed relating to the powers of the Board of Education of the City of St. Louis, that section has been amended by the enactment of Section 165.603, RSMo 1949. Under the latter section it appears that the Board of Education within the City of St. Louis would be required to formally contract for building improvements if the cost exceeds $2500.00.

Mr. Hubert Wheeler

CONCLUSION

It is therefore the opinion of this department that a school board would have the authority to carry on a building program, whatever cost may be involved, without entering into a formal contract with another person for the construction of the building. The school board would have the authority to construct the building by making direct purchases of materials needed and directly employing the necessary supervisory personnel and labor to do the work. However, with regard to the city of St. Louis the Board of Education would have to formally contract for building improvements if the cost would exceed $2500.00, as provided by Section 165.603, RSMo 1949.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:ml

SCHOOLS: Enlarged school district entitled to receive state aid as provided in Senate Bill 143 when building program was
STATE AID: begun before effective date of said bill but will not be completed until after said date. Enlarged school district with more than 250 pupils enrolled entitled to additional building aid under Senate Bill No. 143 in carrying out an additional building program.

FILED
96

May 17, 1952

5-23-52

Mr. Hubert Wheeler
Commissioner of Education
Department of Education
State Capitol Building
Jefferson City, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this department, which, in part, reads:

> "Senate Bill No. 143 of Laws 1951, applicable to reorganized school districts, repealed Section 165.697 and re-enacted the same section with some additional provisions for providing state building aid to reorganized districts in which it is necessary to erect an equip new buildings. This law appears to be broad enough to include all reorganized districts which have been formed since the enactment of the basic act of 1948. All reorganized districts can qualify for building aid up to $25,000 if they meet the requirements of the law. A few of the larger districts will qualify for aid in excess of $25,000 but not to exceed $50,000. The new law takes effect March 18, 1952.
>
> * * * * * * * * * * *
>
> "I shall be glad to have your advice and official opinion in regard to the following questions:
>
> 1. Could a reorganized school district in which more than 250 pupils are currently

> enrolled and which has never received building aid, qualify for the additional aid in excess of $25,000 as provided in the law if the school building program started before the taking effect of the new law March 18, 1952, but such building program would not be completed until after the present law expires and the new law becomes effective?
>
> 2. If a reorganized district, that has already completed its building project and received the maximum building aid before the effective date of the new law, cannot qualify for any additional aid on its completed building program would it be possible for such districts, if the current enrollment was greater than 250 pupils, to qualify for the additional building aid as provided in the law if an additional required building program was initiated and carried out at some future date after the law is in effect?"

In answering the questions which you have submitted it becomes necessary to construe Section 165.697 of Senate Bill No. 143, which becomes effective March 18, 1952. That section provides:

> "All school districts enlarged under sections 165.657 to 165.707 in which the erection of one or more new school buildings or additions to one or more existing buildings is made necessary by reason of such reorganization, state aid shall be provided in the amount of one-half of the cost of said building or buildings, addition or additions and equipment up to twenty-five thousand dollars for any enlarged district. Any district formed under sections 165.657 to 165.707 shall receive said building aid in the amount of one-half the cost of said building or buildings, addition or additions and equipment at the rate of one hundred dollars per pupil times total number of pupils currently enrolled in school or

> schools of said district as certified by the board of education of said district to the state board of education when such amount may exceed twenty-five thousand dollars, but total state aid for this purpose shall not exceed fifty thousand dollars for any enlarged district. All building plans shall be approved by the state board of education. When the conditions herein prescribed have been complied with, and when at least one-half of the building program has been completed as determined by the state board of education, one-half of the money due any enlarged school district shall be certified by the state board of education to the state comptroller for his approval and warrants shall be issued for the amount due and payable to the treasurers of the several counties of the state; and upon the completion of the building program the balance of the money due any enlarged school districts shall be certified by the state board of education to the state comptroller for his approval and warrants shall be issued for the balance due and payable to the treasurers of the several counties of the state."

The above section, as did the old section of the same number, now appearing in the Revised Statutes of 1949, applies to all enlarged school districts organized under Sections 165.657 to 165.707, RSMo 1949.

The new section principally differs from the old section in that the amount of state aid is increased to a maximum of $50,000 which may be received by the larger districts, based on the number of pupils enrolled. The new statute further provides when an enlarged district can receive payment of the state aid.

In the new statute, as well as the old, we perceive the underlying purpose of the Legislature in enacting the statute to be that of assisting enlarged school districts to provide adequate building facilities. In other words, with the organization of enlarged districts encompassing several smaller school districts, the need for additional building facilities and equipment was foreseen to properly carry on the school program within said enlarged districts. Inasmuch as this would require considerable expenditure of funds by the enlarged districts, the Legislature has undertaken to assist them with this

burden by providing financial aid from funds made available by the state.

Therefore, in construing Section 165.697, supra, we must do so with its primary purpose in mind, for it is a cardinal rule of statutory construction that legislative acts must be construed according to the purpose of the enactment. Inre Cartsides Estate, 357 Mo. 181, 207 S.W. (2d) 273; State v. Toombs, 324 Mo. 819, 25 S.W. (2d) 101; Lusk v. Public Service Comm., 277 Mo. 264, 210 S.W. 72.

In State ex rel. Rodgers v. Pretended Consolidated School Dist. No. 1, 359 Mo. 639, 223 S.W. (2d) 484, 488, the court, with reference to school statutes, said:

> " * * * We may not capriciously ignore the plain language of the statute but in determining what the language really means we may consider the entire purpose and policy of the statute and 'the language in the totality of the enactment' and construe it in the light of 'what is below the surface of the words and yet fairly a part of them.' The meaning of statutes and particularly the meaning of our school statutes may not be found in a single sentence but in all their parts and their relation to the end in view or to the general purpose. * * * "

Turning again to Senate Bill No. 143, under the provisions of Section 165.697 before an enlarged school district is entitled to any state aid as provided by the statute its building plans must be approved by the State Board of Education and at least one half of the building program must be completed as determined by said Board.

In considering your first question we assume that the plans for the building program started before March 18, 1952, have been or will be approved by the State Board of Education. We further assume that on March 18 there will not have been any determination by the State Board of Education relative to the degree of completion of the building program, and also that as of that date no state aid will have been paid to the enlarged district in connection with its current building project.

Consequently, the situation which you present is that of an enlarged district initially seeking state aid subsequent to March 18, 1952. Presumably some kind of application or request for state aid will be made by the enlarged district to the State Board of Education, among other things stating that the building program is at least one half completed and requesting payment of one half of the amount of state aid to which the school district is entitled.

It is our thought that under this state of affairs the State Board of Education in taking appropriate action relative to the application or request by the enlarged school district for state aid would be governed by the provisions of the law then in effect. Such would be contained in Section 165.697 of Senate Bill No. 143, and under that section the qualifications of the school district for state aid would be determined.

It would therefore follow that under the provisions of the law then in effect the enlarged school district with more than two hundred and fifty pupils enrolled would, under the facts stated in your first question, be entitled to the additional aid in excess of $25,000, to be paid in the manner provided in Section 165.697, supra.

Giving this construction to the statute we believe effectuates the purpose of the law as contemplated by the Legislature.

Now to proceed to your second question. Under the facts you have outlined it would appear that an enlarged district has already conducted a building program to its completion prior to the effective date of Senate Bill No. 143, and has been paid the maximum benefit or state aid as provided in Section 165.697, RSMo 1949, which was then in effect.

It is conceivable that under these circumstances the enlarged district carried out a building program within its financial limitation, and had more funds been available at the time the building program was being conducted a more extensive project commensurate with actual building needs would have been undertaken.

Therefore, if subsequent to the taking effect of Senate Bill No. 143, additional building facilites were still necessary as a result of reorganization to adequately carry on the school program within the enlarged district, and the additional program would in effect be an extension to the one originally initiated, we believe that said district could qualify for state aid under Section

165.697 of Senate Bill No. 143. But with this conclusion we are confronted with the problem of determining the amount of state aid an enlarged district would be entitled to receive under Senate Bill No. 143 where said district has already received the maximum building aid under the old law.

Looking again to the effect and purpose of the new law as compared to the old law, we first note that both laws intended to allow state aid for building projects in an amount up to one half the cost of the project within certain limitations.

Under the old law the maximum amount which could be received by any enlarged school district was $25,000.

Under the new law the maximum amount was increased to $50,000, however, this additional amount over $25,000 is only made available to larger school districts with more than 250 pupils on the basis of pupil enrollment.

Enlarged school districts with 250 pupils or less can, under no circumstances, receive more than $25,000 building aid regardless of the cost of the building program. Consequently, a smaller district (250 pupils or less) which has heretofore received $25,000 building aid has received the maximum aid and could not qualify for additional aid under the new law.

As heretofore noted, a larger district (over 250 pupils) is entitled to receive one half the cost of a building project up to the maximum amount of $50,000. Such we perceive to be the intent of the Legislature.

It therefore becomes necessary to consider what a larger district has already received in determining the amount of aid it can qualify for under the new law.

For example, if a district with 500 pupils has heretofore received $25,000 under the old law, and after the effective date of the new law it builds another $100,000 building it could only receive another $25,000. If, after the new law becomes effective, it erects a building, or an addition to one in existence, costing less than $50,000 it could only receive one half the cost thereof although that amount added to the $25,000 previously received would be less than $50,000.

The amount of building aid a larger district could receive under the new law is further regulated by the number of pupils enrolled. For example, if a larger district with 300 pupils enrolled had previously received aid under the old law in the amount of $10,000

for erecting a building, or an addition, costing $20,000, and after the new law becomes effective it erects a building costing $80,000, it could receive maximum aid in the amount of only $30,000, which would be at the rate of $100 per pupil times the total number of pupils enrolled.

Therefore, in answer to your second question an enlarged district with more than 250 pupils would be entitled to additional building aid under Section 165.697 of Senate Bill No. 143 in excess of the maximum received under the old law in carrying out an additional building program made necessary by reorganization. However, said aid combined with that previously received could not exceed $50,000, could not exceed more than one half the cost of the new building program nor could it exceed the amount computed at the rate of $100 times the total number of pupils enrolled.

CONCLUSION

It is therefore the opinion of this department that an enlarged school district which has started a building program prior to March 18, 1952, but which will not be completed until sometime after that date, would be entitled to state aid as provided in Senate Bill No. 143, enacted by the 66th General Assembly, when no state aid has been previously received.

Further, it is our opinion that an enlarged district with more than 250 pupils would be entitled to additional building aid under Section 165.697 of Senate Bill No. 143 in excess of the maximum received under the old law in carrying out an additional building program made necessary by reorganization. However, said aid combined with that previously received could not exceed $50,000, could not exceed more than one half the cost of the new building program, nor could it exceed the amount computed at the rate of $100 times the total number of pupils enrolled.

Respectfully submitted,

APPROVED:

J. E. TAYLOR
Attorney General

RICHARD F. THOMPSON
Assistant Attorney General

RFT:ml

SCHOOLS: State Board of Education may apportion as excess school moneys one half of the
APPROPRIATIONS: biennium appropriation made by the Legislature for school purposes.

June 18, 1952

6-27-52

FILED
96

Mr. Hubert Wheeler
Commissioner of Education
Capitol Building
Jefferson City, Missouri

Dear Sir:

Your letter at hand requesting an official opinion of this department, which reads as follows:

> "The General Assembly has appropriated to the public schools of this State $7,000,000 for the biennium period beginning July 1, 1951 and ending June 30, 1953. Said sum being in addition to the amount appropriated for the same purpose for a like period in Section 2.260, H.B. #3, an act of the 66th General Assembly. In brief this appropriation supplements the one-third General Revenue appropriation. I refer you to Section 10.360, page 50, H.B. 496 (omnibus bill). This appropriation has now been approved by the Governor and the money is available for distribution to the public schools.
>
> "During the last biennium the General Assembly, in Section 9.790, page 17, H.B. 436, appropriated $5,000,000 for the public schools which was in addition to the regular one-third general revenue. The Department of Education requested the Governor to release one-half of the amount for each year of the biennium, therefore $2,500,000 was distributed to the public schools for each year of the biennium period. This money was distributed to the public schools on the same basis as the

distribution of other school funds which was required in the appropriation act. Last biennium the General Assembly completed the appropriation somewhat earlier than the similar appropriation this year, which made the first half of the appropriation available before the third scheduled payment period of the regular school moneys was completed. Therefore, the supplementary appropriation was sent out to the school districts along with one of the regular scheduled payments. This year, because of the delay in completing the appropriation, the money was not available until after the third scheduled payment period had passed.

"The present problem in relation to the distribution of the supplemental appropriation is the establishment of a legal basis for sending out to the public schools this year the money due these districts after the scheduled payment periods have passed.

"Section 161.030, RSMo 1949 provides that the State Board of Education shall annually, before August 31, apportion the public school funds for the benefit of the public schools in the manner provided by law. Section 161.040 provides that on or before the 15th day of December each year the amount of the public school funds in the State Treasury as of the last day of the preceding November, shall be apportioned to each and every school district as provided in the law. Section 161.040 also provided that on or before the 15th day of March of each year, the public school fund in the State Treasury as of the last day of the preceding February shall apportion school moneys again to the districts in the State. These three scheduled periods direct the State Board of Education in the distribution of public school moneys to the free public schools in this State.

"The appropriation act, Section 10.360, page 50, H.B. #496, 66th General Assembly, includes

$7,000,000 for the biennium period ($3,500,000, annually) to be apportioned and distributed for the support of free public schools as provided in the laws governing the regular public school moneys. School districts in this State need the money due for this year in order that they may complete their contracted obligations with teachers and make adequate budget plans and contract with teachers for the ensuing year. Many inquiries have come to this Department from various parts of the State asking when it will be possible to receive money due their districts from the supplementary appropriation.

"It is the desire, and seems to be proper for the Department of Education to make a supplementary payment to schools at this time for one-half of the biennium appropriation, $3,500,000, in order that schools may meet their obligations and make financial plans for the ensuing year. All data is now available for making the distribution exactly as provided by law. It would be a simple task to make the supplemental payment to schools. However, since the three scheduled payment periods directing the distribution of public school moneys have passed for this fiscal year, we desire to know whether it would be within the provisions of the law to make the distribution of the delayed appropriation at this time. If the appropriation had become available before the last distribution period there would have been no legal question involved.

"The law governing the distribution of State School Moneys and setting up scheduled periods for such distribution appear to be directive rather than a mandatory and limited schedule for such distribution. The three indicated directive schedules for the apportionment of School Moneys are carefully followed by this Department but they do not seem to be so restricted that this Department could not exercise the power of distribution of school moneys varying somewhat from the schedule. The law contains no prohibition which would

> make null or void any variations from the schedules. Certainly no injury would result from a delayed distribution of School Moneys, but rather great good would be accomplished for the school districts.) Therefore it appears that the law directing payment periods of State School Moneys is not so limiting that it would prevent some variations from the schedule. It would appear that the purpose of the General Assembly would be accomplished by making the supplemental distribution at this delayed period.
>
> "I shall be glad to have your advice and official opinion in regard to the following question:
>
> "Would it be proper and in substantial compliance with the law for this Department to make a supplementary distribution of State School Moneys at this time amounting to $3,500,000, which is one-half of the total biennium appropriation as authorized by the General Assembly in Section 10.360, H.B. 496."

It is our further understanding that request has been made for release of $3,500,000, or one half of the total biennium appropriation, as provided by the 66th General Assembly in Section 10.360 of House Bill No. 496, and that said request has been approved. Said distribution, if made, would be for the period from July 1, 1951 to June 30, 1952.

You now inquire if the Department of Education can make a supplemental distribution of this additional school money inasmuch as the last scheduled apportionment period (March 15) for apportioning public school funds is passed.

Section 10.360, supra, which provides for the appropriation of which one half is now desired to be apportioned and distributed, reads as follows:

> "There is hereby appropriated out of the State Treasury, chargeable to the Postwar Reserve Fund, the sum of Seven Million Dollars ($7,000,000.00), to be used for the support of free public schools; said sum to be apportioned and distributed for the support of free public schools, as provided by law, for the period beginning July 1, 1951 and ending June 30, 1953,

> said sum being in addition to the amount appropriated for the same purpose for like period in Section 2.260 of House Bill No. 3, an Act of the 66th General Assembly."

From the above enactment it is apparent that the money appropriated for the use and support of free public schools is public school money and is to be apportioned and distributed as such.

The above statute provides that said money is to be apportioned and distributed for the support of free public schools as provided by law, which we construe to mean in the same manner as the law provides for the apportionment of public school funds.

In this connection Section 161.040, RSMo 1949, provides for the manner and time of apportionment and distribution of public school funds, and, in part, reads:

> "2. The state board of education is hereby empowered, and it shall be its duty, on or before the thirty-first day of August of each year, to apportion the public school fund of the state as follows: It shall calculate an equalization quota, as herein defined, for each and every district entitled to such quota. For each and every district not entitled to an equalization quota it shall calculate a teacher quota in accordance with the basis provided in section 161.030, and an attendance quota in accordance with the basis provided in section 161.030, at the rate of one and three-tenths cents a day. It shall apportion to each and every district for which an equalization quota was calculated the amount as herein provided, and it shall apportion to each and every district not receiving an equalization quota the teacher and attendance quotas as above provided.
>
> "3. On or before the fifteenth day of December of each year, it shall determine the amount of the public school funds in the state treasury as of the last day of the preceding November, and from this amount it shall apportion to each and every district

for which an equalization quota was calculated at the time of the apportionment made on or before the thirty-first day of August last preceding, the remainder of such quota, if any remainder there be. It shall also apportion to each and every district for which teacher and attendance quotas were calculated at the time of the apportionment made on or before the thirty-first day of August last preceding the remainder of such quotas, if any remainder there be, or such part of such remainder as the funds available for apportionment will permit; and on or before the fifteenth day of March of each year, it shall determine the amount of the public school fund in the state treasury as of the last day of the preceding February, and from this amount it shall apportion to each and every district for which an equalization quota was calculated at the time of the apportionment made on or before the thirty-first day of August, last preceding, the remainder of such quota, if any remainder there be. It shall also apportion to each and every district for which teacher and attendance quotas were calculated at the time of the apportionment made on or before the thirty-first day of August last preceding the remainder of such quotas, if any remainder there be, or such part of such remainder as the funds available for apportionment will permit; * * * provided further, that the state board of education shall at the time of making the annual apportionment, apportion to the various districts their allotments of building, transportation and tuition aid as provided by law; provided, however, in the event there should be insufficient funds to carry out the minimum guarantee of seven hundred and fifty dollars for each elementary teaching unit and one thousand dollars for each high school teaching unit, and the teacher quota and the attendance quota of one and three-tenths cents for such districts as do not participate in the minimum guarantee, all school funds to be apportioned by virtue of the provisions of this law shall be apportioned to all districts in pro rata proportion, paying such percentage

of each and every one of these apportionments as the money available in the public school fund will permit; provided further, that after all apportionments herein provided have been paid in full, the state board of education shall make an additional apportionment to each and every district in the state which has levied a tax of one dollar on the one hundred dollars assessed valuation for school districts formed of cities and towns, and also consolidated and enlarged districts in which the boards of education may levy one dollar on the one hundred dollars assessed valuation for school purposes (teachers' wages and incidentals) and for all other districts which by law may levy sixty-five cents of the one hundred dollars assessed valuation for school purposes, and to which an equalization quota or teacher and attendance quota apportionments have been made on or before the thirty-first day of August, last preceding, of two hundred dollars for each elementary teaching unit in which a teacher having a state certificate is employed; one hundred and twenty-five dollars for each such unit in which a teacher having a first grade certificate is employed; one hundred dollars for each unit in which a teacher having a second grade certificate is employed; fifty dollars for each such unit in which a teacher having a third grade certificate is employed and three hundred dollars per high school teaching unit; and an additional attendance apportionment of one and six-tenths cents per pupil day based on total days attendance of preceding year to each and every such district to which teacher and attendance quotas or equalization quota apportionments have been made; provided further, that any school district levying less than the tax rate for school purposes as provided in this section shall receive that per cent of such additional apportionments as the tax rate levied in said district is of the tax rates as defined in this section for making the additional apportionments.

> "4. In the event the amount of money in the public school fund is not sufficient to pay these quotas in full the state board of education shall pay such percentage of both the teaching unit and the attendance quotas as the amount in the public school fund will permit; provided further, that after all apportionments herein provided have been paid in full the state board of education shall apportion any excess remaining in the school fund equally among all of the districts of the state in proportion to the number of teaching units in each district as reported to the state board of education for the preceding year; * * *"
> (Emphasis ours.)

The above statute, as quoted, generally provides for a basic apportionment to be made on or before August 31 of each year. Such would also be the first apportionment to be made in the fiscal year of July 1 to June 30. At such time an equalization quota and a teacher and attendance quota are calculated. The statute then provides for an apportionment on or before December 15 of each year, and on or before March 15 of each year, of the remainder of the equalization quota and teacher and attendance quota as calculated at the time the basic apportionment was made on or before August 31.

The statute further provides for an additional apportionment to school districts after the apportionments for equalization quotas and teacher and attendance quotas have been paid in full.

Paragraph 4 of the statute then provides that, after all of the apportionments provided for have been paid in full, if there is still an excess of school moneys remaining it shall be apportioned by the State Board of Education equally among all the school districts of the state in proportion to the number of teaching units in each district as reported to the State Board for the preceding year.

With regard to the apportionment of the excess school moneys, it does not appear that any specific time is stated when such apportionment is to be made, and therefore it would seem that said apportionment could be made any time after the specific apportionments provided for in the statute were made and distributed.

Mr. Hubert Wheeler

As supplemental information to your opinion request you have informed us that all apportionments specifically provided in Section 161.040, supra, have been paid in full. Consequently it is our thought that the $3,500,000 allocated for distribution for the period from July 1, 1951 to June 30, 1952, which would be one half of the appropriation provided for by Section 10.360 of House Bill No. 496, would be excess school moneys which could presently be apportioned and distributed in the manner provided by Section 161.040, pertaining to the apportionment of excess school moneys.

CONCLUSION

It is therefore the opinion of this department that the State Board of Education can presently make an apportionment and distribution of state school moneys allocated for distribution amounting to $3,500,000, which is one half of the total biennium appropriation provided for by Section 10.360 of House Bill No. 496, enacted by the 66th General Assembly.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:ml

TIMBER: RECORDS KEPT BY PURCHASER: Record as to the section, township and range on which timber grew is sufficient.

FILED
97

January 11, 1952

1-14-52

Honorable Homer F. Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Sir:

We are in receipt of your recent letter requesting an opinion of this department. Your letter is as follows:

> "With reference to Section 560.490 of the RS of Mo. 1949, some of the purchasers of timber who are required to keep a record of the person from whom they buy the timber, etc. as set out in said section only require the party selling them the timber to give the section, Township and Range, but do not require the seller to give the subdivisions of the section, from which they claim the timber comes.
>
> "We do have some people who are suspicioned of stealing timber especially from non-residents, and it would seem that a seller would be able to give the subdivisions of the section from which he claims the timber comes, as his deed would show, or if he had purchased same his timber deed or contract should show, but the purchasers have the idea that under this section they only have to get information as to the township, Section and Range, so far as the description is concerned.
>
> "Do you think that is a sufficient compliance, or do you think they should also be furnished with the legal subdivisions of the section from which said timber comes?"

Paragraph 2 of Section 560.490, RSMo 1949, which paragraph constitutes the portion of said section pertinent to your inquiry is as follows:

> "Every person, firm, partnership, or corporation engaged in buying any railroad ties, staves, stavebolts or other manufactured timber products or any trees or parts thereof for manufacture into timber products, shall keep a record of every such purchase and said record shall be kept in a place where such property is delivered to the purchaser. Said record shall contain the name of the person or persons from whom such property was purchased, the amount thereof, the date of purchase and the legal description of the section, township and range of the county from which such timber was cut and taken, which information shall be obtained from the person or persons selling such property and be kept open for public inspection during business hours, and any person, firm, partnership or corporation, failing so to do shall be guilty of a misdemeanor."

The substance of your inquiry is whether or not the keeping of the record of the section, township and range from which the timber purchased is taken rather than the keeping of the record of the subdivisions of said section, constitute compliance with the following portion of the section above quoted: "Said record shall contain the name of the person or persons from whom such property was purchased * * * and the legal description of the section, township and range of the county from which such timber was cut and taken which information shall be obtained from the person or persons selling such property * * *."

We are of the opinion that since the statute mentions the legal description of the section, township and range specifically and does not mention the legal description of any subdivision of the section it is not possible to construe the statute as requiring the purchaser of the kinds of timber specified in the statute to obtain from the seller of the timber a description of a subdivision of a section.

We call attention to the fact that the section provides that a violation thereof is a misdemeanor and we suggest the fact that penal statutes must be strictly construed. In the case of State v. Bartley, 304 Mo. 58, l.c. 62, the opinion of the court contained the following language:

> "* * * Criminal statutes are to be construed strictly; liberally in favor of the defendant and strictly against the State, both as to the charge and the proof. * * * *"

Hon. Homer F. Williams

We are of the opinion that a strict construction of the above quoted provision of the statute precludes the idea that the statute requires any land description beyond the mention of the section, township, range and county from which the timber is removed.

CONCLUSION

We are accordingly of the opinion that the keeping of the record by the purchaser of the timber on information furnished by the seller as to the section, township and range and county from which the timber was taken, constitutes compliance with Section 560.490, RSMo 1949, and that reference to the subdivision of the section from which the timber was taken is unnecessary.

Respectfully submitted,

APPROVED:

J.E. TAYLOR
Attorney General

SAMUEL M. WATSON
Assistant Attorney General

SMW:mw

OFFICERS:) Officers whose residence is five or more miles from point where he serves as a witness is entitled to receive witness fees.

January 16, 1952

1-17-52

FILED
97

Honorable Arnold J. Willmann
Coroner
St. Louis County
601 Brentwood Boulevard
Clayton 5, Missouri

Dear Sir:

Your request for an opinion of this office concerning officers' witness fees at a coroner's inquest has been received and is as follows:

> "Stanley Wallach, the Prosecuting Attorney in St. Louis County, recently advised me that he had received an opinion from you concerning the right of attorneys to cross examine witnesses at an inquest. Will you please forward a copy of that opinion to me.
>
> "A number of police officers attending inquests have requested payment of witness fees to them under Section 550.160, RS Mo. 1949. Those who have requested this fee live more than 5 miles from the place where the inquests are held. I have continued to refuse to pay these officers under the theory that the above section prohibits any police officer from receiving a witness fee when he testifies to matters concerning investigations made in his routine duties as a police officer. Please advise me if I am correct in refusing to pay these officers

> even though they live 5 miles
> from the place of the inquests."

We are enclosing herewith copy of opinion dated October 8, 1951, given to Honorable Philip A. Grimes, Prosecuting Attorney of Boone County, Missouri, relating to cross examination of witnesses at coroner's inquests in accord with your request. Our files indicate that a copy of this opinion has heretofore been sent you. However, I am at present unable to verify this conclusion.

In reply to the second paragraph of your letter relating to witness fees of police officers attending coroner's inquests we refer you to Section 550.160, RSMo 1949, which is as follows:

> "No officer, appointee or employee holding a state, county, township or municipal office, including police officers and policemen, either by election or appointment, shall claim, be allowed or receive any fee or compensation as a witness for testifying before a coroner's inquest, grand jury, or in any criminal cases. All officers, appointees and employees as aforesaid, shall be compelled to attend the trial of all criminal cases, coroner's inquests and grand juries, when legally subpoenaed; provided, that the provisions of this section shall not apply to any officer who is a witness in any case where the residence of such officer is five miles from the place where the trial or coroner's inquest is held, or where the grand jury is in session."

Honorable Arnold J. Willmann

The provisions of the above statute do not apply to police officers and policemen, nor to other officers serving as witnesses before a coroner's inquest, grand jury, or in any criminal case if such officers reside five miles or more from the place where the trial or coroner's inquest is held or where the grand jury is in session. If such officer's residence is five or more miles from the place where he testifies before a coroner's inquest, grand jury or any criminal case, he is unquestionably entitled to receive his statutory witness fees.

We are enclosing herewith an opinion of this office given to Honorable Arkley Frieze, Prosecuting Attorney of Dade County, Missouri, dated May 9, 1939, which deals with the question as to whether or not a state highway patrolman who resides five or more miles from the place of trial is entitled to receive witness fees. We are of the opinion that the same reasoning would apply to police officers testifying at a coroner's inquest.

CONCLUSION

It is, therefore, the opinion of this office that a police officer whose residence is five miles or more from the point where he serves as a witness before a coroner's inquest, grand jury, or in any criminal case, is entitled to receive his statutory fees as such witness.

Respectfully submitted,

GROVER C. HUSTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GCH/fh

Enclosures

ELECTION JUDGES:

CANDIDATES FOR OFFICE: A candidate for office cannot serve as an election judge at the election in which he is a candidate.

FILED
97

October 27, 1952 10-27-52

Mr. Homer F. Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Mr. Williams:

We have given careful consideration to your request for an opinion, which request is as follows:

> "I would like your opinion on the following questions relating to the general election laws of the state, as follows:
>
> "1. May a candidate for county office act as an election Judge at the general election, at the general election at which he is a candidate in the county?
>
> "2. May a candidate for county office, who is also a notary, legally, take the acknowledgements of sick absentee voters who are voting absentee ballots, in connection with the affidavit which they make in connection therewith, said votes being residents of and voters of the county in which said notary is a candidate for county office?"

Your second question is answered in the affirmative. In support of this conclusion we herewith enclose a copy of an official opinion of this office written in 1950 for Ralph B. Nevins, Prosecuting Attorney of Hickory County, Missouri.

Your first question is related to Section 111.310, RSMo 1949, which is as follows:

> "No person shall be qualified to act as a judge or clerk of any election unless he shall be legally entitled to vote at such election, and shall moreover be able to read and write."

This statute prescribes certain qualifications for judges and clerks of elections in all counties below the first class. But it does not undertake to enumerate all of the requirements contained in the law. A candidate for office is not disqualified by the contents of this statute. But there is a well-known rule under the common law which holds that a public officer must not perform duties or functions in matters in which he may hold an interest. Any such practice is said to be against public policy.

This principle is stated in 67 C.J.S. 114, as follows:

> "Public officers are not permitted to place themselves in a position in which personal interest may come into conflict with the duty which they owe to the public."

The Supreme Court of Missouri has sustained this doctrine in numerous cases. In Witmer v. Nichols, 320 Mo. 665, l.c. 671, the court said:

> "Nichols as a member of the Board of Directors owed the School District an undivided loyalty in the transaction of its business and in the protection of its interest; this duty he could not properly discharge in a matter in which his own personal interests were involved. The principle is so well settled that we do not deem it necessary to cite authorities."

This principle was also invoked by the Supreme Court in the matter of arbitration in the case of Schwartzman v. Fire Insurance Company, 318 Mo. 1089. In the course of that opinion, l.c. 1096, the court said:

> "Even though the evidence tends to establish that no conscious or actual

> bias, prejudice, influence or fraud was disclosed on the part of the umpire, yet public policy and an unconscious predilection to favor one's interest renders an arbitrator, directly or indirectly interested in the result of the arbitration, partial, incompetent and disqualified. It is evident from what we have said that the appraisal was void and of no effect, thus obviating the necessity of considering the competency of defendant's appraiser."

An election judge is a public officer whose duties constrain him to expend his best efforts to promote a fair and impartial election. This he can not do if he has a personal interest in the contest, and any candidate for office is certainly interested in the outcome of the election. To permit a candidate to serve would be inconsistent and contrary to public policy in the same sense, but not the same degree, as to permit a party to a lawsuit to serve on the jury in his case.

CONCLUSION

It is the opinion of this office that a candidate for a county office cannot legally serve as an election judge at the general election in the county in which he is a candidate.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

Enclosure

COUNTY COURTS:
ADJOURNED TERMS: Two judges constituting a quorum for doing business under Section 49.070 RSMo 1949, may legally call an adjourned term of county court on Saturday following adjournment of regular term the previous day, under authority of Section 49.200 RSMo 1949.

May 23, 1952

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5/28/52

Honorable Thomas G. Woolsey
Prosecuting Attorney of Morgan County
Versailles, Missouri

Dear Sir:

Your recent request for a legal opinion of this department has been received, and reads in part as follows:

> "I would appreciate your office furnishing me an opinion in response to the following question:
>
> "Can two judges of the County Court call and hold a legal session of the County Court, on a Saturday, when they have adjourned from a Friday to the following Monday?"

Section 49.010, RSMo 1949, provides the number of judges that shall compose the county court, and reads as follows:

> "The county court shall be composed of three members, to be styled judges of the county court, and each county shall be districted by the county court thereof into two districts, of contiguous territory, as near equal in population as practicable, without dividing municipal townships."

Section 49.070, RSMo 1949, provides that a majority of the members of the county court shall constitute a quorum to do business, and reads as follows:

> "A majority of the judges of the county court shall constitute a quorum to do business; a single member may adjourn from

> day to day, and require the attendance of those absent, and when but two judges are sitting and they shall disagree in any matter submitted to them, the decision of the presiding judge at the time being, to be designated by the clerk of such court, shall stand as the judgment of the court."

Section 49.170, RSMo 1949, states the number of terms and when they shall be held, and reads as follows:

> "Four terms of the county court shall be held in each county annually, at the place of holding courts therein, commencing on the first Mondays in February, May, August and November. The county courts may alter the times for holding their stated terms, giving notice thereof in such manner as to them shall seem expedient; provided, that in counties now containing or that may hereafter contain seventy-five thousand or more inhabitants, and where county courts are now or may hereafter be held at more places than one and at other places than the county seat, the terms of said court shall be held monthly and alternately at the county seat and such other place as may be provided for the holding of such court, and each monthly term shall commence on the first Monday in each month."

From the last federal census it appears that your county of Morgan had a population of 10,108, and that the latter portion of Section 49.170, providing for the holding of county court in counties of seventy-five thousand or more inhabitants, where court is held at more than one place in the county has no application to the inquiry in the opinion request. You have not stated that your county court has changed the time for holding regular terms from those provided by the statute, and it is assumed that such regular terms are held four times annually, each commencing on the first Mondays in February, May, August and November.

It is further assumed that a quorum of the members of your county court were present at some regular term of court when court was adjourned from one Friday until the following Monday, and that on Saturday, following the Friday of adjournment two judges called an adjourned session, and your inquiry is whether these two judges might legally call the adjourned session.

Section 49.200, RSMo 1949, authorizes the county court to hold adjourned terms, and reads as follows:

> "Each county court may hold adjourned terms whenever it may become necessary for the transaction of its business."

In commenting upon the power of the county court to call special and adjourned terms of court under the provisions of the statutes of 1899, (and which are substantially the same as those of 1949, quoted above) in the case of State ex rel. v. Mitchell, 127 Mo. App. 455, the St. Louis Court of Appeals said at l.c. 459:

> "* * *Section 1783, Revised Statutes 1899, so far as pertinent here, provides that four terms of the county court shall be held in each county annually, commencing on the first Monday of February, May, August and November. Section 1787 provides for adjourned terms whenever it may become necessary for the transaction of the county business, and these adjourned terms are of course continuations and parcel of the regular term. (Trammel v. Railway, 101 Mo. 136, 13 S.W. 505.) Section 1785 provides: 'The president or any two judges of the county court may order a special term whenever the business and interest of the county may require it.' Section 1786 provides for notice of such term. It clearly appears from these several statutory provisions, the Legislature intended to authorize a term of the county court of some character, either regular, adjourned or special, as expressed in the statutes, 'whenever' the business or interests of the county seem to require it. Now it is and has long been the custom of usage of these courts in many of the counties of the state at least, to meet the first Monday in every month of the year; that is to say, to adjourn the May term to the first Monday in June, and in June to adjourn to the first Monday in July; and so with each succeeding term, preparatory to disposing of such matters as may properly come before the court. The Legislature certainly manifested its concern in this connection by specially providing the adjourned terms when in truth and in fact, the power to adjourn from time to time and to hold adjourned terms was inherent in the court

> without the aid and wholly irrespective of the statute. (Higgins v. Ransdall, 13 Mo. 205-208.) However, that may be, the section manifests the concern of the Legislature in providing for frequent and convenient terms of court, to the end that the business in which the county is interested, be not neglected. * * *"

Also in the case of State ex rel. v. Nash, 83 Mo. App. 509, a county court adjourned on the sixth to the twelfth day of March, 1900, and on the seventh day of the same month it met and considered certain matters, the Kansas City Court of Appeals held that such county court was lawfully in session on the seventh day of March and that the order made by the court on that day was a valid order. The court said at l.c. 512 of said opinion:

> "It is stated in the return of the respondent that the said county court adjourned on the sixth day of March, 1900, to the twelfth day of said month, and that on the seventh day of said month it met and made said order.
>
> "The only question raised by the pleadings is whether or not the action of the county court when it met in session on the seventh day of March 1900, and made the order in question was valid. That the said court was lawfully in session when it made said order seems well established in this and other states. Cole Co. v. Dallmeyer, 101 Mo. 66; State ex rel. v. Railway, 101 Mo. 136; Green v. Morse, 77 N.W. Rep. 925; Bowen v. Stewart, 26 N.E. Rep. 168; Wharton v. Sims, 88 Ga. 617; The Canary, 22 Fed. Rep. 536; Eastman v. Concord, 64 N.H. 263."

From the statutes, and court opinions quoted above, it appears that the Legislature has granted each county court of the various counties of the state the power to hold adjourned terms of court whenever necessary for the transaction of its business. It further appears, that under such authorities, each county court has been granted the power to determine when it shall be necessary for it to hold an adjourned term or terms for the transaction of its business.

Since Section 49070, provides that a majority of the members of the court shall constitute a quorum to do business; the calling of an adjourned term of your county court by two of the judges on a Saturday, following the Friday on which the regular

Hon. Thomas G. Woolsey

term of said court was adjourned to the following Monday was legally and properly called.

CONCLUSION

It is therefore the opinion of this department that two judges, constituting a quorum of the members of a county court for the purpose of doing business, under the provisions of Section 49.070, RSMo 1949, may legally call an adjourned term of court under the provisions of Section 49.200, RSMo 1949, whenever, in the opinion of said judges, the adjourned term is necessary for the transaction of the court's business, and that the calling of an adjourned term by two judges on the Saturday following the adjournment of the regular term the previous day was legally and properly called.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PNC:hr